Supreme Court, U.S.
FILED
001405 MAR - 7 2001
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No. ·

In the

Supreme Court of the United States

VINCENT L. BARNES,

Petitioner,

versus

EVA L. BARNES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF STATE OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Given the fact that a natural parent has a fundamental right and a protectable liberty interest in the companionship, care, custody, and management of his or her child under the United States Constitution, can a State Court restrict access to a child in the absence of a parent submitting to mental examination, where no harm has ever been done to the child, the parent has no previous psychiatric history, and state statute, specifically, Maryland Annotated Code, CJ Article, Section 9-109(b), has been interpreted by Maryland's highest court to mean that the assertion of parental fitness in child custody cases does not waive psychiatrist-patient privilege?

2. Does gender bias in the State Courts deny fathers equal access to their children and deny men equal protection under the Fourteenth Amendment to the United States Constitution?

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Vincent L. Barnes petitions for a Writ of Certiorari to review the Order of the Court of Appeals of the State of Maryland in this case.

OPINIONS BELOW

The December 8, 2000 Order of the Court of Appeals of Maryland in Docket No. 435, September Term 2000 attached at Appendix A (p. 1a) The August 15, 2000, unreported opinion of the Court of Special Appeals of Maryland, Docket No. 908, September Term 1999 attached at Appendix B (pp. 2a-14a). Prince George's County Circuit Court Order dated May 12, 1999 in the matter of *Vincent Barnes v. Eva Barnes*, Case No. CAD 96-12495 noted as Appendix C (pp. 15a-16a). Prince George's County Circuit Court Order dated April 29, 1997 in the matter of *Vincent L. Barnes v. Eva Elaine Barnes*, Case No. CAD 96-12495 attached as Appendix D (pp. 17a-19a).

STATEMENT OF JURISDICTION

Men are treated differently than women in the State of Maryland and denied equal protection under the law with regard to the placement, visitation, custody, care, and management of their children. Additionally, children are denied access to parents based on the natural parent's gender. This denial of equal protection and the liberty interest under the Fourteenth Amendment of the United States Constitution give rise to a federal question, which this Court should address. All appeals having been exhausted in the State of Maryland, jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

STATUTES INVOLVED

Maryland Annotated Code, CJ Article, Section 9-109(b):

> Unless otherwise provided, in all judicial, legislative, or administrative proceedings, a patient or his authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing, communications relating to diagnosis or treatment of the patient's mental or emotional disorder.

Maryland Annotated Code, FL Article, Section 9-101:

> (a) Determination by court. – In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.
>
> (b) Specific finding required. – Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and the physiological, psychological, and emotional well-being of the child.

STATEMENT OF THE CASE

Vincent L. Barnes and Eva E. Barnes were married on June 13, 1992, and had a child named Faith Barnes, on February 16, 1994. The parties separated in 1995. By agreement of the parties, they alternated weekly visitation beginning in February 1996. (See Appendix E pp.20a-22a). If the father had the child for seven (7) days, the mother would have the child the next seven (7) days. This visitation arrangement was incorporated into a Court Order on April 29, 1997. The mother continued to deny access at every opportunity and alleged that she was afraid of the father. Eva E. Barnes continued to file Ex Parte Complaints for Domestic Violence and at the subsequent hearings would deny that any act of violence occurred. The mother would tell the Court in no uncertain terms that she wanted the father's visitation with the child reduced. The mother would allege that the child was sick and could not go with her father. To satisfy the mother, the Court put in a provision in the April 27, 1997 Order which stated – that if the child was sick while with the Mother, child shall stay with the Mother until the illness passes. No such provision was put in for the father and the mother had no special medical training to care for the child. The mother was a receptionist. Additionally, the child suffered from no particular medical infirmity. The child got colds like any other child.

When several months went by without the father being afforded visitation, he filed a Motion for Contempt and wanted to see records relating to the child's illness. The Court advised the father that the April 27, 1999 Order did not provide for him to receive documentation of any illness.

However, the Court ordered a mental evaluation, of the father which the father refused to undergo.

On August 13, 1998, the Court made a finding that –

> ... There is no allegation at this hearing or anything that I read that there is any physical or mental harm to the minor child as a result of visitation.

Yet, on May 12, 1999, the Court entered an Order that said in part –

> That until Plaintiff/Counter-Defendant, Vincent Barnes, submits to a mental hygiene evaluation through the Circuit Court Mental Hygiene Consultation Service, unsupervised visitation between the minor child, Faith Barnes, and Plaintiff/Counter-Defendant, Vincent Barnes, is suspended ...

The Court of Special Appeals affirmed the trial Court Order of May 12, 1999 in an unpublished opinion and the Maryland Court of Appeals declined to take the case.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL QUESTION

The State of Maryland has recognized that a parent has a fundamental right to the care and custody of his or her child. *Boswell v. Boswell*, 352 Md. 204, 721 A.2d 662 (1998). The United States Supreme Court has held that a natural parent has a protectable liberty interest in the companionship, care, custody, and management of his or her children. *Stanley v. Illinois*, 405 U.S. 645 (1972). Almost sixty years ago, this Court held that the right to rear a child is a parent's basic civil right. *Skinner v. Oklahoma*, 316 U.S.

535, 541 (1942). Yet, the State of Maryland, without just cause, has taken that right away from a parent based solely on gender bias. Maryland as all states generally award custody to the mother and limit a father's role in the child's life. Most litigation involves the inability to have any meaningful access to children by the father. While the issue of a protectable liberty interest was presented to the appellate courts, the State Courts chose not to address this issue.

The Court of Special Appeals states on page 14a of its opinion (Appendix B) –

> Moreover, the clause in the order that Vincent references, "that if the child is sick while with the Mother, (the) child shall stay with the Mother until the illness passes, " did not give any gender-based preference to Eva. It simply allowed Faith to remain with Eva if she were to become sick while in Eva's physical custody.

The Court ignored the fact that the father could not have the child stay with him if the minor became sick. Obviously, the April 27, 1997 Order was the beginning of the gender-biased actions taken by the Maryland trial and appellate courts in this matter. The Court's action was not based on any benefit to the child, because if the child was sick while with the father and it was cold and rainy outside, the minor would still have to go with the mother pursuant to the Order.

The analysis of the Court of Special Appeals is akin to an Abbott and Costello routine - When I say you are cuckoo, I do not mean you are crazy, I mean you are nuts.

The unopposed brief before the Court of Special Appeals was filed on November 18, 1999 (See Appendix F pp.23a-44a) and the Maryland Court of Appeals did not issue its opinion in *Laznovsky v. Laznovsky*, 357 Md. 586, 745 A.2d 1054 (2000) (See Appendix G pp. 44a-82a) asserting that parental fitness in child custody cases does not waive psychiatrist-patient privilege under *Maryland Annotated Code*, CJ Article, Section 9-109(b) until February 11, 2000. Oral argument in the Court of Special Appeals in *Barnes v. Barnes*, Docket No. 908, September Term 1999 occurred on February 7, 2000.

There was no evidence of abuse or harm to the child under *Maryland Annotated Code*, FL Article, Section 9-101. To enter an Order on May 12, 1999 barring unsupervised visitation, where alternate week visitation had gone on for three (3) years without any alleged harm to the child is baseless and denial of the Petitioner's liberty interest in the care and management of his daughter. It is illogical and untenable to deprive the child of unrestricted access to her father and the father unrestricted access to the minor where no harm has ever been done to the child.

II. ADDRESSING THE WELFARE OF OUR CHILDREN AND A PARENT'S ABILITY TO BE A PART OF A CHILD'S LIFE

The importance of family cannot be overemphasized. See. *Santosky v. Kramer*, 455 U.S. 745 (1982),*Boothe v. Boothe*, 56 Md.App. 1, 466 A.2d 58 (1983). The trier of fact in limiting and denying access is destroying the family stability that the child has known for more than half her life. Clearly, the actions of the Maryland Courts are not in the child's best interest.

The actions of courts in denying fathers contact with their children is a growing problem in our society. More than ninety percent of the time, mothers have custody of the children. Is it possible that in an egalitarian society that so few fathers are fit to be the custodial parent? Even more puzzling, is the question of whether fathers are fit to have unrestricted access to their children.

The problem is growing. Many books have been written on the bias of the courts in custody and visitation cases. The situation is not improving. See. Robert Seidenberg, *The Father's Emergency Guide to Divorce-Custody Battle*, Jes Books, Inc., 1997.

III. WHAT WILL REVIEW PROVIDE

As a result of the inability of fathers across the nation to have equal access to their children, a review by this Court could provide significant guidance to all states and territories in our country. A review by this Court will have far reaching impact on how state courts handle custody and visitation matters in the future. The Supreme Court could decide if it is appropriate to deny children access to their fathers ninety percent of the time. With most juvenile delinquency among young males coinciding with the absence of a father, a ruling by the Court in this matter, could impact, not just on the family makeup, but on crime in our nation. A review could help stabilize the family unit as opposed to excluding males from actively participating in their children's lives.

The question becomes whether the Fourteenth Amendment and the fundamental basic civil right to participate, care, and work with your children has any real meaning at all as fathers continue to be excluded from meaningful contact with their children.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A – DECEMBER 8, 2000 ORDER OF THE COURT OF APPEALS OF MARYLAND IN DOCKET NO. 435, SEPTEMBER TERM 2000

Barnes v. Barnes

Pet. Docket No. 435, September Term, 2000

COURT OF APPEALS OF MARYLAND

362 Md. 34; 762 A.2d 968; 2000 Md. LEXIS 778

December 8, 2000, Decided

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/ Robert M. Bell
Chief Judge

Date: 12/8/2000.

APPENDIX B – AUGUST 15, 2000, UNREPORTED OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND, DOCKET NO. 908, SEPTEMBER TERM 1999

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 908

SEPTEMBER TERM, 1999

VINCENT L. BARNES

V.

EVA L. BARNES

Davis,
Salmon,
Byrnes,

JJ.

Opinion by Byrnes, J.

Filed: 8/15/2000

Vincent Barnes ("Vincent"), appellant, challenges a May 12, 1999 order of the Circuit Court for Prince George's County granting a motion for emergency relief that had been filed by Eva Elaine Barnes ("Eva"), appellee, after Vincent failed, for the third time, to attend a court-ordered mental hygiene examination. The order modified an April 29, 1997 custody order pertaining to Vincent and Eva's only child, Faith, by

granting Eva sole physical custody of Faith with supervised visitation for Vincent, until such time *as* he submitted to a mental health examination. Vincent also challenges an August 6, 1999 order granting Eva permanent sole legal and physical custody of Faith.

> Vincent poses the following questions for review:
>
> "1. Is the denial of *access* or supervision of visitation by the Court for refusal to undergo a mental evaluation where the child has been with the non-custodial parent every other week for over three years, and appropriate sanction where no harm has ever been shown?
>
> 2. Is lying to the Court and providing false information to the trier of fact concerning a witness and other data a fraud and a denial of due process which would warrant a retrial?
>
> 3. Are the false statements made by [Eva] to deny [Vincent] due process sufficient to warrant a new trial on marital property, the grounds for divorce, and the entry of a monetary award?"

For the following reasons, we affirm the orders of the circuit court.

FACTS

Vincent and Eva were married on June 13, 1992. Faith was born on February 16, 1994. Soon thereafter, the couple began to have marital problems. They separated in August of 1995.

In June of 1996, Vincent filed a complaint for custody in the Circuit Court for Prince George's County. Eva filed a counter complaint for custody. Eventually, that issue was tried before the court, for two days. On April 29, 1997, the court issued an order granting legal custody of Faith to Eva and shared physical custody of Faith to both parties, and establishing an alternate week visitation schedule. All exchanges of the child were to occur at the Forestville, Maryland State Police barracks. The trial court further ordered that "if the child is sick while with the Mother, [the] child shall stay with the Mother until the illness passes."

From April 1997 until the end of that year, the parties exercised shared physical custody. Thereafter, during a several month period, Eva and Vincent had recurring disagreements over Faith's health and whether she was sick and needed to stay with Eva until she was well. Ultimately, Vincent filed a motion for contempt against Eva claiming she was violating the April 29, 1997 order by denying him access to Faith.

On April 28, 1998, a hearing on the contempt petition was held before Master Arnold C. Yochelson. Eva and Vincent both testified. Master Yochelson found from Vincent's testimony that his position on visitation was that "if I don't see the child when I want, how I want, and on my terms, I'm not going to see the child." The master concluded that Vincent's attitude had been the reason why the parties had not been able to carry through with the visitation schedule. He found that Eva had not willfully violated the April 1997 order. Finally, on the basis of numerous letters that Vincent had sent to the court suggesting that there was a conspiracy to deprive him of access to Faith on the part of Eva, her lawyer, and the court, the master recommended that the parties be referred to the "circuit court mental hygiene consultation service" for custody and visitation mental health evaluations. He also recommended that the alternate week

visitation be resumed.

Eva and Faith completed their mental health evaluations. Vincent did not appear for his evaluation. Thereafter, Eva filed a "motion for emergency relief," asking the court to suspend visitation. A hearing on that motion was held on August 13, 1998. During the hearing, Eva's attorney expressed concern to the court about Vincent's mental health. In particular, she described a letter that Vincent had written to a law foundation, in which he had accused the court and Eva's attorney of conspiring to deprive him of his civil rights. In the letter, Vincent had stated, "I am no fool, but I will take action after the trial. **If** this is planned, I already have a plan after the trial, and believe me someone will get hit too."

The court denied Eva's motion for emergency relief. It stated that "the letters are a bit unusual. . .but. . .there has been no allegation.. .that the child is at any risk, or at any harm." The court once again ordered a mental health evaluation for Vincent, and directed him to attend it or to risk being held in contempt.

In the meantime, Vincent filed a complaint for absolute divorce on the ground of adultery. He later amended the complaint to request a change in custody. Eva filed a supplemental counter complaint requesting a divorce on the ground of two-year separation and also requesting a modification of the visitation schedule.

On September 8, 1998, a hearing took place before Master Julia Weatherly on the merits of the divorce and property issues. In a written report and recommendation, Master Weatherly recommended that the court grant the parties a divorce on the ground of two-year separation. The master found that "the value of [the parties] personal property [was] so minimal according to either party, that there [would] be no profit after the cost of sale." Vincent filed exceptions to

the master's recommendations.

Vincent's re-scheduled mental health evaluation was set for October 26, 1998. He did not appear for it. At Eva's request, on December 8, 1998, the court held a hearing to address why Vincent's visitation with Faith should not be suspended pending his attendance at a mental health evaluation. After Robin J. Derwin, of the Circuit Court Mental Hygiene Consultation Service ("Mental Hygiene"), testified and explained how the mental health evaluation would be conducted, Vincent agreed to attend the evaluation. The evaluation was re-scheduled for April 21, 1999.

Vincent did not appear for the April 21, 1999 evaluation. Instead, he wrote a letter to Ms. Derwin stating that he was not going to attend. Two days after Vincent failed to appear for the scheduled evaluation, Ms. Derwin wrote to the court, stating:

> In his letter, [Vincent] repeatedly referred to his perception of various conspiracies [against him] . Of particular concern, has been [Vincent's] allegations that [Eva] has another child out of wedlock. There is no substantiation to those allegations.... [Eva] described to us in several telephone contacts that Faith is having a very difficult time with the current visitation arrangement. We would expect no less, given the circumstances of this case.
>
> [Vincent] has failed for the third time to appear for a scheduled appointment. It is clear he does not trust our service, and agin we respectfully request that the Bench address this issue. It is our belief and concern that [Vincent] has some untreated psychological issues that may be negatively impacting on his

> child's psychological well being. This matter is further exacerbated by the alternating week visitations that have been going on for the past two years. Given [Vincent's] refusal to comply with the court order to complete the evaluation process here, our service as in the past, recommended that [Vincent] seek a private evaluation elsewhere with a qualified clinician.

After Eva filed another motion for emergency relief. On May 7, 1999, the court held a hearing on that motion and on Vincent's exceptions to Master Weatherly's recommendations on the merits of the divorce and property matters. Vincent, Eva, and Ms. Derwin testified. Eva requested that, until Vincent submit to a mental health evaluation, his visitation with Faith be supervised, at the Safe Visitation Center in Hyattsville. The court granted Eva's request, stating:

> [U]nless and until [Vincent] submits to a mental health evaluation by a Court approved psychologist, that [Vincent] is not to have unsupervised visits with Faith Barnes and that the shared custody order (of April 28, 1997) is, therefore, null and void; and that from this point forward, custody will be entirely in [Eva] but for the visitation to be worked out and scheduled with the Save Visitation Center.

The court denied Vincent's exceptions.

Two months later, on July 6, 1999, the court held a hearing on the issues of permanent custody and visitation. By order of August 6, 1999, the court granted Eva sole legal and physical custody of Faith. Vincent was granted supervised visitation, until such time as he would submit to the

previously court-ordered mental health evaluation.

Vincent noted timely appeals from the orders of May 12, 1999 and August 6, 1999.

Additional facts will be recited as necessary to our discussion.

I.

Vincent contends that the trial court erred in "deny[ing] access or supervision of visitation. . . for [Vincent's] refusal to undergo a mental evaluation where the child has been with the non custodial parent every other week for over three years. . .where no harm [to the child] has ever been shown." He cites Md. Code (1999), 9-101 of the Family Law Article ("F.L."), for support.

First, we note that the circuit court did not deny Vincent access to Faith. The May 12, 1999 orders modified the April 29, 1997 custody order so as, *inter alia*, to make Vincent's visitation with Faith supervised, until such time as he submitted to a mental health examination. Thus, the orders did not deny Vincent access to his daughter.

Further, Vincent's reliance on F.L. § 9-101 is misplaced. That section is entitled, "Denial of custody or visitation on basis of likely abuse or neglect." It provides:

> (a) *Determination by court.* In any custody or visitation proceeding, if the court has reasonable grounds to believe that a child has been abused or neglected by a party to the proceeding, the court shall determine whether abuse or neglect is likely to occur if custody or visitation rights are granted to the party.

> (b) Specific finding required — Unless the *court specifically finds that there is no* likelihood of further abuse or neglect by the party, the court shall deny custody or visitation rights to that party, except that the court may approve a supervised visitation arrangement that assures the safety and physiological, psychological and emotional well-being of the child.

As the language of this statute makes plain, it applies to cases involving child abuse or neglect. In the instant case, there were no allegations of abuse or neglect. There nevertheless was concern brought to the court's attention regarding Vincent's mental health and stability, which could negatively affect Faith. Thus, F.L. § 9-101 did not apply, and nothing in it operated to restrict the court from modifying custody and imposing supervision on visitation if that otherwise was warranted.

A change in circumstances ordinarily is required for a change in custody. *Schaefer v. Cusack* 124 Md. App. 288, 294-95 (1998); *Wagner v. Wagner*, 109 Md. App. 1, 29-30 (1995). Although an order determining custody must be afforded some finality, modification of an existing custody order may be justified as changes warrant if it is in the best interests of the child. *McCready v. McCready*, 323 Md. 476, 481 (1991); *Schaefer*, 124 Md. App. at 294-95; *Wagner*, 109 Md. App. at 29.

The burden to show a change in circumstances warranting modification of custody is on the party who seeks the modification. *Wagner*, 109 Md. App, 31-32. When the court determines that the moving party has satisfied this burden, and thereby has established a justification for a change in custody, its findings must be accorded deference

on appeal, and will only be disturbed if they are plainly arbitrary or clearly erroneous. *Id.* at 32.

During the May 7, 1999 hearing on the motion for emergency relief, the court repeatedly asked Vincent to provide an explanation as to why he had failed three times to attend the court-ordered mental health evaluation (or to obtain an outside evaluation if he was not satisfied with the court's mental health personnel) . Instead of answering the court's questions, Vincent referred to past court hearings, changed the subject, and gave confusing answers. He accused Eva, her attorney, and the court of being in a conspiracy against him, claimed that Eva was trying to "cover up" a relationship with a man named Matthew Preston, and accused Eva of having had a child with Mr. Preston and hiding the existence of the child from the court and from him. He presented no evidence whatsoever to support these allegations, and they were denied by Eva.

In addition, Ms. Derwin testified as follows about Vincent's behavior and conduct:

> [P]rior to [the last scheduled evaluation] I received several letters from [Vincent] asking me to put in writing in detail the evaluation process. After the second letter, I called him and said that I was not going to do that, that it was already explained to him, [and] did he have any particular questions for me. He alluded to various things, wanting his representative to be part of the evaluation. He would not give me a name of who the representative was.
>
> And so at that point, after three attempts, we have not evaluated this case because he has not complied with the order.

> And I, it raises grave concerns for me about the welfare of this child going back and forth every week for two years. And I addressed the letter to Your Honor about my concerns.
>
> * * *
>
> I believe the tone of [Vincent's) letters, his continual references to various conspiracies, the continual reference to this other alleged child where there has been no medical documentation that child exists, his rambling on in the letters, the lack of focus, and it is clear that he believes there is collusion being done against him. Those are issues that raise a lot of concern for me.

Ms. Derwin added that Eva was not vindictive or angry over Vincent's conduct but that she had "genuine concern about the child and some concern about Mr. Barnes and his mental status."

At the May 7, 1999 hearing, the court had before it evidence tending to show that, during the two years following the initial April 29, 1997 custody order, Vincent had become paranoid and disorganized in his thinking, and that this alteration in his thought processes was interfering with his ability to parent Faith. This evidence was sufficient to support the finding that there had been a material change in circumstances warranting a modification of shared physical custody to sole legal and physical custody in Eva, with supervised visitation. It also was sufficient to support the court's determination that such a custody change was in Faith's best interest, until such time as Vincent's mental health status would be assessed by professionals.

With respect to the court's decision to impose

supervision on visitation, which is Vincent's primary complaint on appeal, the Court of Appeals made clear in *Boswell v. Boswell*, 352 Md. 204, 227-28 (1998) that *potential* harm, as well as actual harm, to the child is a component of the "best intents" standard applicable to decisions whether to restrict visitation. Vincent is correct that there was no evidence, and no finding, of actual harm in this case. There was evidence showing that his paranoid thinking and unstable mental state posed potential risks to Faith, however. The lower court did not abuse its discretion in imposing supervision upon Vincent's visitation with Faith until such time as he was evaluated and any potential risk to Faith could be ruled out or assessed.

II.

We will address under one heading Vincent's last two contentions, which comprise five sub-arguments.

First, Vincent argues that Eva "denied [him] the ability to proceed" by "hiding a witness, providing false information, and engaging in specious filings to curtail contact with the child" and that she "defrauded [him] and the Court by making false representations of a matter of fact by conduct and words and by concealing that which should have been disclosed, with the intention of deceiving another to act upon it." He argues that because Eva defrauded the court by lying to it, the orders that he has challenged on appeal should now be vacated.

Our review of the record reveals that Vincent never requested the lower court to vacate its order on the basis of fraud, or on any basis. Thus, there is no ruling by the court denying a motion to vacate. It is not our function as an appellate court to make a first level determination as to whether an order or judgment of the circuit court should be vacated. We serve to review rulings of that sort as made by

the circuit court and in this case, there is no such ruling to review. We find there was no motion to vacate a specific ruling on the basis of fraud. To make a determination that the Eva defrauded the court, we would have to review a ruling of the trial court on that basis. Because Vincent never requested that the lower court vacate a specific judgement, we are not able to review this issue. *See* Md. Rule 8-131 (a)

Vincent's next argument is difficult to discern. He refers to an order of November 3, 1999, entered in another case, that granted Faith's maternal grandparents *pendite lite* visitation, and appears to argue that a mental health evaluation of Mr. Preston should have been ordered in that case and in the instant case. The grandparent visitation case is not before us in this appeal. In the case that is before us, we do not see that any request was made by Vincent for a mental health evaluation of Mr. Preston. Accordingly, there is no ruling for us to review.

Vincent next argues that the circuit court erred during the May 7, 1999 hearing by incorrectly referring to Ms. Derwin as a professional psychologist, when she is a social worker. Vincent never raised this issue below, so it is not preserved for review. Md. Rule 8-131. We cannot conceive how it could have any merit in any event.

Vincent's fourth argument is that "an order stating that if the child is sick, the child should stay with the mother, where the mother has no medical expertise, is inherently gender-biased and a violation of the Maryland Constitution, Declaration of Rights, Article 46." He points out that the sex of a parent cannot be a factor in awarding custody.

The order that Vincent refers to is the April 29, 1997 custody order. That order is not the subject of this appeal, and the time for Vincent to challenge it on appeal is long past. Indeed, the order was modified by the orders that Vincent has

challenged in this appeal. In any event, we note, the April 29, 1997 order did not deny custody to Vincent; to the contrary, it provided for shared physical custody of Faith on an alternate week schedule. Moreover, the clause in the order that Vincent references, "that if the child is sick while with the Mother, [the] child shall stay with the Mother until the illness passes," did not give any gender-based preference to Eva. It simply allowed Faith to remain with Eva if she were to become sick while in Eva's physical custody.

Vincent's final argument also is difficult to decipher. He states that "[Eva] would not provide information concerning her income, how she was able to pay bills or how much she owed on bills. [Vincent] should not be put in a position where no matter how much discovery he conducts, he is unable to get accurate information concerning [Eva's] assets and liabilities[,]" and argues that, as a result, he was not afforded due process. Vincent does not point to any ruling of the circuit court respecting discovery, or any motion to compel or other motion filed by him respecting discover. Again, there is no ruling of the lower court for us to review.

JUDGMENT AFFIRMED
COSTS TO BE PAID BY APPELLANT.

APPENDIX C PRINCE GEORGE'S COUNTY CIRCUIT COURT ORDER DATED MAY 12, 1999 in VINCENT BARNES V. EVA BARNES, CASE NO. CAD 96-12495

CASE NO.:CAD 96-1 2495
IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VINCENT BARNES
Plaintiff/Counter-Defendant

vs.

EVA BARNES
Defendant/Counter-Plaintiff

ORDER OF COURT

THIS MATTER having come before the Court on May 7, 1999 on the Defendant/Counter-Plaintiffs Motion for Emergency Relief, and the Court having considered the entire file, the Motion, the Opposition thereto, the Memorandum of Circuit Court Mental Hygiene Consultation Seryice, the testimony of Robin Derwin and argument in open Court, it is thereupon this 12th day of May, 1999 by the Circuit Court for Prince George's County, Maryland

ORDERED, that the Motion is hereby GRANTED; and it is further

ORDERED,that Plaintiff/Counter-Defendant, Vincent Barnes, is hereby ordered and directed to submit to a mental hygiene evaluation through the Circuit Court Mental Hygiene Consultation Service; and it is further

ORDERED, that the provision of the previous Order of Court dated April 29, 1997 that awarded the parties shared

physical custody of the minor child, is hereby declared null and void; and it further

ORDERED, that until Plaintiff/Counter-Defendant, Vincent Barnes, submits to the mental hygiene evaluation through Circuit Court Mental Hygiene Consultation Service, Defendant/Counter-Plaintiff, Eva Barnes, is awarded sole physical custody of the minor child of the parties, Faith Barnes; and it is further

ORDERED, that until Plaintiff/Counter-Defendant, Vincent Barnes, submits to the mental hygiene evaluation through the Circuit Court Mental Hygiene Consultation Service, unsupervised visitation between the minor child, Faith Barnes, and the Plaintiff/Counter-Defendant, Vincent Barnes, is suspended; and it is further

ORDERED, that until Plaintiff/Counter-Defendant, Vincent Barnes, submits to the mental hygiene evaluation through Circuit Court Mental Hygiene Consultation Service, visitation between the Plaintiff/Counter-Defendant, Vincent Barnes, shall take place at, and under the supervision of, the Family Crisis Center, or under the supervision of a mutually agreed upon third person.

JUDGE

cc: Vincent Barnes
6702 Milltown Court
District Heights, Maryland 20747
Crystal E. Pinkney
3700 Donnell Drive Suite 207
Forestville, Maryland 20747

APPENDIX D - PRINCE GEORGE'S COUNTY CIRCUIT COURT ORDER DATED APRIL 29, 1997 IN VINCENT L. BARNES V. EVA ELAINE BARNES, CASE NO. CAD 96-12495

Case No. CAD 96-12495
IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

VINCENT L. BARNES
Plaintiff

vs.

EVA ELAINE BARNES

Defendant

ORDER OF COURT

UPON CONSIDERATION of the Complaint for Custody, the testimony presented, evidence adduced, it is this 27, day of April, 1997, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Parties be, and hereby are, awarded shared physical custody of the one minor child, Faith Barnes, born February 16, 1994, with each party to have alternating weeks of visitation from Saturday at 9:00 am. to the following Saturday at 9:00 a.m. with the Plaintiffs visitation week to begin Saturday, May 3, 1997 at 9:00 am. and all exchanges to occur at the Forestville, Maryland, State Police Barracks; and it is further,

ORDERED, that the Defendant shall have sole legal custody of the minor child; and it is further,

ORDERED, that the Plaintiff and Defendant shall attend family counselling once a week, and it is further,

ORDERED, that neither Party make any disparaging remarks against or about the other in the presence of the minor child; and it is further,

ORDERED, that Child Support payable by Plaintiff in the amount of $195.00 per month shall continue commencing May 1, 1997 via a wage lien with all payments made through the Office of Child Support Enforcement with Plaintiff making all payments until the Wage Lien takes effect; and it is further,

ORDERED, that the Plaintiff shall pay counsel for the Defendant the sum of Seven Hundred Fifty Dollars ($750.00) for counsel fees within One Hundred Twenty (120) Days; and it is further,

ORDERED, that Plaintiff shall not come within 100 yards of Defendant's Apartment; and it is further,

ORDERED, that all communications be via Fax and Parties are to keep a copy; and it is further,

ORDERED, that the Parties shall inform each other regarding the child's medical condition, and any significant change in work status, day care, medical and dental providers, church and address; and it is further,

ORDERED, that if the chld is sick while with the Mother, child shall stay with the Mother until the illness passes; and it is further,

ORDERED, that neither Party shall remove the child from the Washington Metropolitan area for more than twelve (12) hours without the Court's permission; and it is further,

ORDERED, that this Order constitutes an immediate and continuing Order on all earnings of the obligor that are due on or after the date of this Order; and it is further,

ORDERED, that the withholding Order be served immediately on the obligor's employer, and it is further,

ORDERED, that if the obligor accumulates support payments arrears amounting to more than thirty (30) days of support, the obligor shall be subject to earnings withholding; and it is further,

ORDERED, that the obligor is required to notify the Court within ten (10) days of any change of address or employment so long as the support Order is in effect; and it is further,

ORDERED, that failure to comply with the above item of this section will subject the obligor to a penalty not to exceed $250 and may result in the obligor not receiving notice of proceedings for earnings withholding.

S/Thomas P. Smith – Judge

Copies mailed by the Court to:

Charles Janus, Esq.
6504 Old Branch Avenue
Suite 206
Temple Hills, MD 20748

APPENDIX E 1996 AGREEMENT BETWEEN THE PARTIES REGARDING VISITATION

EVA ELAINE BARNES AND VINCENT L. BARNES

TEMPORARY VISITATION AGREEMENT

DATE: Monday, February 26, 1996

TO: Mr. Vincent L. Barnes
Father of Faith Tiarra Barnes

FROM: Mrs. Eva Elaine Barnes
Mother of Faith Tiarra Barnes

SUBJECT: Temporary Visitation Agreement between Eva Barnes and Vincent Barnes. Parents of Faith Tiarra Barnes.

AGREEMENT

I Eva Elaine Barnes and Vincent L. Barnes agreed to have a Temporary Schedule of Visitation with our Daughter every other weekand every other weekend as agreed upon on Monday, February 26, 1996.

I also agree to keep Mrs. Pat McCollough as the babysitter. I will continue to send Faith Tiarra Barnes to Pat McCollough house and pick her up from there by 4:30, until further arrangements have been made by the District Court.

Example: Mr. Vincent Barnes will start his visitation (during the week) first on Monday, February 26th thru Friday, March 1st. Mr. Vincent Barnes will return his Daughter back to Eva Barnes at Police Department in Forrestville, MD on Saturday, March 2nd at 9:00 a.m.

Mrs. Eva Barnes will have Visitation (during the weekend)

from Saturday, March 2nd thru Sunday, March 3rd. Mrs. Eva Barnes will have her Daughter (during the week) on Monday, March 4th thru Friday, March 8th. Mrs. Eva Barnes will return her Daughter to Mr. Vincent Barnes at the Police Department in Forrestville, MD on Saturday, March 9th at 9:00 a.m.

Mr. Vincent Barnes will have visitation with his Daughter (during the weekend) from Saturday, March 9th thru Sunday, March 10th.

Mr. Vincent Barnes will be the next parent to have our Daughter for a week and Mrs. Eva Barnes will be the next parent to have our Daughter for the weekend and so on.

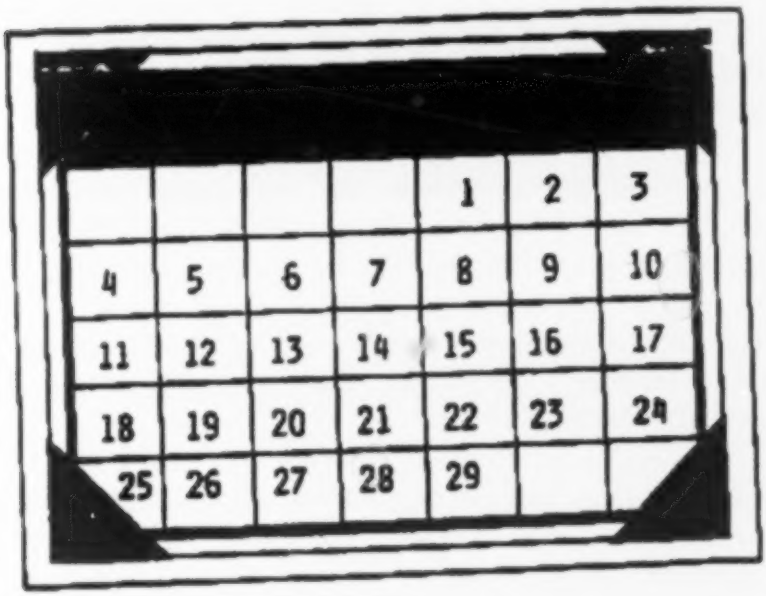
I understand and agreed that this Visitation Agreement will be a Temporary Agreement, until we can settle this at the next Court Hearing.

Note: Attached to this Temporary Visitation Agreement is a Calendar to be used as a guide. This Calendar will help Eva Barnes and Vincent Barnes keep-up with the scheduling of visitation.

Eva Barnes Signature Vincent Barnes, Signature

EVA ELAINE BARNES AND VINCENT L. BARNES TEMPORARY SCHEDULE OF VISITATION WITH FAITH TIARRA BARNES

FEBRUARY 1996



				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29		

-Vincent L. Barnes Days of Visitation.
-Eva Elaine Barnes Days of Visitation

APPENDIX F BRIEF OF APPELLANT/FATHER TO THE COURT OF SPECIAL APPEALS

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

NO. 00908
SEPTEMBER TERM, 1999

VINCENT L. BARNES
Appellant

V.

EVA E. BARNES
Appellee

APPEAL FROM THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY

(HONORABLE SHERRIE L. KRAUSER)

BRIEF OF APPELLANT

CHARLES J. JANUS
Janus & Rubard
6504 Old Branch Avenue, #206
Temple Hills, MD 20748
301/449-5212

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IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

NO. 00908
SEPTEMBER TERM, 1999

VINCENT L. BARNES
Appellant

V.

EVA E. BARNES
Appellee

APPEAL FROM THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY

(HONORABLE SHERRIE L. KRAUSER)

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The parties were married on June 13, 1992, and had a child, named Faith Barnes on February 16, 1994.

In August, 1995, Appellee left the marital home and filed an Ex Parte Complaint for Domestic Violence against the Appellant and was awarded custody. The Appellant was given visitation. However, the only physical attack documented during the three (3) years of trial was the fact that Appellee pulled a knife on Appellant. (E. 410, lines 11-17). District Court Judge Michael P. Whalen found Eva Elaine Barnes in Contempt of Court for denying access. On February 28, 1996, Appellant and Appellee reached a written

agreement to alternate weeks of visitation. (E. 1-3). If the mother had the child for the first seven (7) days of a month, the father would have the child the next seven (7) days.

On June 7, 1996, Appellant filed a Complaint for Custody. Mother continued to deny access to the father on a random basis. When the mother would not allow the father to visit with the child on Thanksgiving, 1996, Mr. Barnes went to Ms. Barnes' home. Ms. Barnes subsequently filed another Ex Parte Complaint for Domestic Violence, which was heard by District Court Judge Gerald Devlin on December 9, 1996. (E. 4-11). Appellee told the Judge there was no physical violence. (E. 5, line 17). There were no threats of violence. (E. 10, lines *5-6).* The Judge dismissed the Domestic Violence Complaint. (E. 11, lines 16-2 1). Appellee was deposed on December 30, 1996, and said she wanted Appellant's visitation reduced. (E. 26, lines *2-5).* Appellee stated during her deposition that she had given the Appellant the child when the child was sick and that Mr. Barnes had taken the child to the doctor. (E. *55,* lines 10-15). Appellee also admitted that she took the child to daycare and there were children at daycare with runny noses. (E. 56, lines 1-7). Appellee then admitted that there was a virus going around in November of 1996 and 35 percent of the children were out of school when she denied the father access during the Thanksgiving Holiday in 1996. (E. *59,* lines 8-19). While Appellee denied access because the child was sick, she took the minor to have Thanksgiving dinner with her relatives. Both parties also hold full-time jobs. Knowing these facts, on April 29, 1997, Judge Thomas P. Smith entered an Order on Appellanfs Complaint for Custody, left the alternating weeks of visitation in effect, awarded the Appellee, mother, sole legal custody of the child, and stated that if the child is sick while with the mother, the child shall stay with the mother until the illness passed. (E. 13). This same right was not afforded the father and the mother possessed no specific medical knowledge. It seems that the Court was following the

dictates of 'Dr. Mom' in a Robitussin commercial.

It is this ***"if the child is sick"*** clause in the April 29, 1997 Order (E. 12-14) that Appellee used to deny access to Mr. Barnes for four (4) months until a Motion for Contempt was heard in April, 1998. At the end of the hearing, the Court ruled that Appellee was to begin the alternating week visitation again, but the Court did not find her in contempt. (E. 156-157). There was no medical evidence presented that the child was sick, and the Court ruled there was no requirement that Appellee present any such evidence. (E. 153, lines 1-12).

In November 1996, while Appellee denied Appellant access to the minor child, Mr. Barnes happened to see a man driving his wife's car at 9:30 p.m. Appellant followed the car, which stopped at the Appellee's apartment. Ms. Barnes claimed the man was a mechanic working on her car in the rain. That man was Matthew Preston. Appellant said she did not have his telephone number and she did not know his address or where he worked. (E. 49-5 3). Appellee continued to be evasive about Mr. Preston. Despite interrogatories and document requests from Appellant, Ms. Barnes continued to deny she knew anything about Mr. Preston. (E. 177, lines 18-25, E. 178, lines 1-2, E. 182, lines 1-6, and E. 196, lines *11-25).* In the September 8, 1998 transcript, it was noted that she had said that Matthew Preston was a babysitter, and then she said he worked at some kind of lawn place. (E. 235, lines 7-17). Mr. Preston was seen with Ms. Barnes on a regular basis. Witnesses placed Mr. Preston at Appellee's apartment on June 8, 1998. (E. 274, lines 8-2 1). Appellee, at the hearing of September 8, 1998, continued to deny any knowledge of the whereabouts of Mr. Preston. (E. 404). On July 6, 1999, Appellee continued her course of deception. Ms. Barnes was asked if she had an intimate relationship with Matthew Preston and she responded, 'No, I do not." (E. 533, lines 11-13). Finally, after three (3) years of discovery, and

continuous denials from Appellee. Ms. Barnes stated on cross-examination -

Q. Also, are you aware that Matthew Preston have the same address that you have?.

A. Yes.

Q. On his license?

A. Yeah.

Q. Are you aware that when we did data base search that Matthew Preston have the same old address and new address that you had?

A. Yeah, I get his mail.

Q. You get his mail?

A. Yeah, his mail comes to my house.

Q. Why does his mail come to your house?

A. Because he asked me if I could keep his mail, because he, he moves all the time.

(E. 539, lines 14-25, and E. 540, lines 1-3).

Appellee has two (2) cars in her name, and she states the other one belongs to Mr. Preston. (E. 540, lines 21-25). When asked who pays the insurance on the car in her name that purportedly belongs to Mr. Preston, Ms. Barnes states that the car is under her "insurance, but he. . . (Matthew Preston)... . . pays for it." (E. 558, lines 24-25).

Appellee states on July 6, 1999 (E. *550,* line 4) that

Matthew Preston is a tractor trailer driver.

Appellee acknowledges that she gave a number of professions for Mr. Preston. (E. 550, lines 8-23). When asked how long Matthew Preston had been a tractor trailer driver, Appellee said about a year and was able to list a place of employment. Yet, on September 8, 1998, less than one year before, Appellee was asked if she knew where Mr. Preston worked and answered -

No. The last time I heard it was Green Chem Lawn.

(E. 404, lines 19-20). However, the final topping on the cake was Ms. Barnes's marriage to Matthew Preston on September 20, 1999. (E. 582).

Appellee stated that Appellant was violent and delusional, despite the alternate week visitation that lasted for three (3) years. The visitation was uneventful other than Appellee's denials of access. Appellant knew that there was in intimate relationship between his wife, Eva Elaine Barnes, and Matthew Preston. Ms. Barnes did not allege the fifth amendment when asked about Mr. Preston, she falsely denied all contact and knowledge.

Mr. Barnes said he was not going to participate in the mental evaluation until he got information on Matthew Preston, the man that his wife was with at least since 1996, and probably since 1995, when she left him. (E. 225, lines 2-8). The child called Matthew Preston, "Daddy Preston". (E. 174, lines 18-19, and E. 555, lines 1-6). Ms. Barnes also stated on July 6, 1999 that she had had a relationship with Mr. Preston for about a year and a half (E. 552, lines *5-6).* In discovery, Appellee knew nothing about the man she was going to marry. (E. ***556,*** lines 11-25, E. 557, and E. 558).

When Appellee filed an Emergency Motion to

Suspend Visitation, the Court noted that -

> there has been no allegation at this hearing or anything that I read that there has been any physical or mental harm to the minor child as a result of visitation.

(E. 209, lines 22-25, and E. 210, line 1). The Court found that no emergency exits at this juncture which "would warrant me halting the visitation." (E. 208, lines 20-24). No additional facts showing any potential harm to the child were ever presented at any subsequent hearing. The only facts presented at future hearings tended to show that Ms. Barnes misrepresented items to the Court, such as her relationship with Matthew Preston. Appellant noted the defects in discovery concerning Appellee hiding information and not complying. (E. 193-198). Appellant wants Appellee's friend, Matthew Preston, to be a part of the evaluation process, especially since Matthew Preston pulled a knife on Appellee. (E. 194, lines 1-6). Crystal Pinkney, counsel for Appellee at trial, noted that Ms. Barnes stated under oath in discovery that she did not have Matthew Preston's work address, that Mr. Preston did not live with her, that she did not have Mr. Preston's home address on May 7, 1999 at the Exceptions hearing. (E. 490, lines 15-25, and E. 491, lines 1-6).

Appellant cannot receive a fair trial if one side is lying under oath to the Court. On May 7, 1999, the Court asked Robin J. Derwin, a licensed clinical social worker according to her letter to the Court of April 23, 1999 (E. 462), -

> As a professional psychologist, can you tell me whether Mr. Barnes' letters to you and or reluctance to be evaluated raises any red flags that the court should be concerned about?

(E. 482, lines 20-23). Ms. Derwin did not correct the Judge and rendered her opinion as a professional psychologist, which she is not. The child has never been harmed in any way while in the care of the father. Hence, denying access, except in a supervised environment, is not an appropriate sanction for the Court to impose.

QUESTIONS PRESENTED

1. Is the denial of access or supervision of visitation by the Court for refusal to undergo a mental evaluation where the child has been with the non-custodial parent every other week for over three (3) years, an appropriate sanction where no harm has ever been shown?

2. Is lying to the Court and providing false information to the trier of fact concerning a witness and other data a fraud and a denial of due process which would warrant a retrial?

3. Are the false statements made by the Appellee to deny Appellant due process sufficient to warrant a new trial on marital property, the grounds for divorce, and the entry of a monetary award?

STATEMENT OF FACTS

The parties were married on June 13, 1992, a minor child, named Faith Bames, was born to the parties on February 16, 1994. The parties separated in August, 1995. On February 28, 1996, the parties entered into an agreement alternating weeks for visitation. (E. 1-3). On June 7, 1999, Appellant filed a Complaint for Custody. On April 29, 1997, an Order was entered incorporating the alternate week visitation. (E. 12-14). A divorce hearing was held before the Master on September 8, 1998. The Appellee refused to provide accurate

information through the litigation process. That Appellee had an extended relationship with a man named Matthew Preston throughout the litigation. That the Court entered a Judgment of Absolute Divorce on May 12, 1999 (E. 570), and on August 6, 1999, a final Order relating to supervised visitation was entered. (E. 577-578). Appeals were noted on June 4, 1999 (E. 581) and September 1, 1999 (E. 579).

ARGUMENT PRESENTED

I. Is the denial of access or supervision of visitation **by** the Court for refusal to undergo a mental evaluation where the child has been with the non-custodial parent every other week for over three (3) years, an appropriate sanction where no harm has ever been shown?

The Court committed reversible error when it reduced the Appellant's visitation with the minor child until he underwent a mental evaluation. It is inappropriate for the Court to use it's powers to reduce a child's contact with a parent where there has been no allegation of any physical or mental harm to the minor child as a result of visitation. (E. 209, lines 22-25 and E. 210, line 1). To state that some day in the future, there might be harm, is ridiculous where alternate week visitation and shared physical custody has been in place for more than three (3) years. The Order of May 12, 1999 declaring the "Order of Court dated April 29, 1997 that awarded the parties shared physical custody of the minor child null and void" (E. 574), is an impermissible abuse of discretion. Under Maryland Annotated Code, Family Law Article, Section 9-101, only if the Court has reasonable grounds to believe that a child has been abused or neglected by a party should the Court determine whether the abuse or neglect is likely to occur in deciding visitation or custody. There were no reasonable grounds to believe that the child, Faith Barnes, has ever been harmed by Appellant, father.

"Ordinarily, in determining custody the courts look to the situation as it exists at the time." Schaefer v. Cusack, 124 Md.App. 288, 295, 722 A.2d 73 (1998). Similarly, the Court should look to the present in determining visitation, not the unknown future.

As in Rolley v. Sanford, 126 Md.App. 124, 131, 727 A.2d 444 (1999), the denial of a child's access to a parent is an extreme sanction "well removed from any center mark we can imagine and beyond the fringe of what we deem minimally acceptable." It is illogical and untenable to deprive the child of unrestricted access to her father where no harm has ever been done to the child. See. Boswell v. Boswell, 118 Md.App. 1, 701 A.2d 1153 (1997).

The importance of a family cannot be overemphasized. See. Boothe v. Boothe, 56 Md.App. 1, 6, 466 A.2d 58 (1983), Santosky v. Kramer, 455 U.S. 745, 102 S.Ct 1388, 71 L.Ed.2d 599 (1982). The trier of fact is assisting the Appellee in destroying the family stability that the child has known. We must not forget that Appellee has sought to limit the time the child spends with the Appellant for years. (E. 26, lines 2-5).

II. Is lying to the Court and providing false information to the trier of fact concerning a witness and other data a fraud and a denial of due process which would warrant a retrial?

Fraud

Appellee, by hiding a witness, providing false information, and engaging in specious filings to curtail contact with the child, denied Appellant the ability to proceed. Appellee defrauded Appellant and the Court by

making false representations of a matter of fact by conduct and words and by concealing that which should have been disclosed, with the intention of deceiving another to act upon it. See. Black's Law Dictionary, Rev. 4th Ed., definition of fraud. The fraud perpetrated by Appellee, whether intrinsic or extrinsic, requires that the judgment here be vacated. Pursuant to Tandra S. v. Tvrone W., 336 Md. 303, 648 A.2d 439 (1994), fraud "is extrinsic when it actually prevents an adversarial trial." Here the hiding of information prevented the actual dispute from being submitted to the fact finder at all. The whereabouts, work place, address, and other pertinent information concerning an indispensable witness was kept from the Appellant despite interrogatories, request for production of documents, deposition, and testimony under oath in open Court. By failing to comply, Appellant was denied due process. By lying about the address or knowledge of the address of Matthew Preston, Mr. Barnes was unable to serve Mr. Preston and bring him to Court. Mr. Preston is the man that Appellee married after the final hearing. (E. 582). Matthew Preston has been hidden from the Appellant and the Court for three (3) years. The fact that Mr. Preston held a knife up to Appellee's throat and allowed the child to be a witness to this act of extreme violence, calls into question the entire process. While the Court is allowed to test the credibility of the witnesses, Mr. Preston was excluded from the proceeding by Appellee and the Court was not able to view him or assess his credibility.

Due Process

The Supreme Court has repeatedly held that a natural parent has a protectable liberty interest "in the companionship, care, custody, and management of his or her children ..." Estate of Conner By Conner v. Ambrose, 990 F.Supp. 606, 615 (N.D. Ind. 1997), Stanley v. illinois, 405 U.S. 645, 651, 92 S.Ct. 1208,

1212, 31 L.Bd.2d 551 (1972).

The rights "to raise one's children have been deemed 'essential', (r)ights far more precious than property rights. Bell v. City of Milwaukee, 746 F.2d 1205, 1243 (7th Cir. 1984).

After Appellee was able to exclude the Appellant and the paternal grandparents from all contact with the minor child, Faith Barnes, Appellee finally brought Matthew Preston into the light of day. The paternal grandmother and great-grandmother have petitioned for visitation and Appellee has refused to allow any contact, provide her address or telephone numbers in violation of the Order of November 3, 1999 in the matter of Mary Barnes, et al v. Eva Barnes, Case No. CAD 99-10657. (E. 583-584). The case filed by the Appellant's grandmother requires a mental evaluation of Matthew Preston which is what should have been required in the instant action, but for the the lies under oath that Appellee told the Court.

The trier of fact simply supported Appellee's desire to deny the child contact with the father. A licensed clinical social worker was asked to give an opinion, as a professional psychologist, by the Court and failed to correct the perception. (E. 482, lines 20-23). These occupations are defined separately in the Maryland Annotated Code and have different functions. A social worker is defined in Maryland Annotated Code, HO Article, Section 19-10 1, while a psychologist's functions are defined in Maryland Annotated Code , HO Article, Section 18-101.

An Order stating that if the child is sick (E. 13), the child should stay with the mother, where the mother has no medical expertise, is inherently gender-biased and a violation of the Maryland Constitution, Declaration of Rights, Article 46. The Court of Appeals stated in Griffin v. Crane, 351 Md.

133, 716 A.2d 1029 (1998), that the sex ofa parent cannot be a factor in awarding custody. Yet, the Court in denying access, supports sexual bias as a factor and is following the dictates of 'Dr. Mom" in a Robitussin commercial. The Appellant does not even have the ability to verify whether the child was sick.

> Plaintiff (Appellant) decided that he didn't like the court order and insisted that Defendant (Appellee) get medical proof that the child was sick Simply by way of clarification, folks, there's nothing in the court order that says that. If the child is with the Defendant, the Defendant says the child is sick, the child is sick. That is the end of that. The child stays with her until she gets well.

(E. 153, lines 1-10).

Clearly, Appellant should be afforded a new trial on all issues because the lies that Appellee told taint the process afforded Mr. Barnes.

> III. Are the false statements made by the Appellee to deny Appellant due process sufficient to warrant a new trial on marital property, the grounds for divorce, and the entry of a monetary award?

Appellee would not provide information concerning her income, how she was able to pay bills or how much she owed on bills. (E. 559-566 and E. 23 1-233). Appellant should not be put in a position where no matter how much discovery he conducts, he is unable to get accurate information concerning Ms. Barnes' assets and liabilities. To deny him a monetary award from her 401(k) plan acquired during the marriage is inappropriate. To order a sale of assets which Appellee will not release is ludicrous. To deny a

divorce based on adultery where a witness is excluded from the process by Appellee's conduct is also inappropriate. Finally, adultery is itself a factor in determining who should have custody of the child.

At this juncture, Appellee is married to Matthew Preston, she has left the State, and she has denied Appellant all access to the child even in a supervised environment. Appellant does not know where the child is.

CONCLUSION

Appellant was inappropriately denied access to his child by Appellee who provided false information with the intention of deceiving the Court concerning her relationship with Matthew Preston, her desire for the child to have access to the father, and the extent of her assets and liabilities. The fraud denied Appellant due process. The actions of the Court denied the child contact with her father, who posed no danger or threat to the minor. At this juncture, an Order should be entered granting the Appellant custody, requiring a retrial on all issues, mandating that Matthew Preston be present at any hearing of this matter, allowing the child to be evaluated by an outside party to determine the extent of damage that Appellee has done to the child by excluding the father from her life, and whether the child has been told that Matthew Preston is, in fact, her real father. That all Orders dated May 7, 1999 or thereafter in this action be vacated.

Respectfully submitted,

Charles J. Janus
Attorney for Appellant
6504 Old Branch Avenue, #206
Temple Hills, MD 20748

301/449-5212

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was mailed, postage prepaid, on November 18, 1999, to:

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APPENDIX G - OPINION IN LAZNOVSKY V. LAZNOVSKY, 357 MD. 586, 745 A.2D 1054 (2000)

No. 65, September Term, 1999

COURT OF APPEALS OF MARYLAND

CHRISTA LAZNOVSKY

v.

FRANK LAZNOVSKY

COUNSEL: ARGUED BY: Keith R. Anderson (Griswold, Anderson & Lee, P.A., on brief) of Easton, MD, FOR PETITIONER.

ARGUED BY: Frank T. Laznovsky (Franch, Jarashow, Burgmeier & Smith, P.A., on brief) of Annapolis, MD, RESPONDENT.

JUDGES: ARGUED BEFORE Bell, C.J.; Eldridge, Rodowsky, Raker, Wilner, Cathell, and Harrell, JJ.

OPINIONBY: Cathell

OPINION:

Opinion by Cathell, J.

Petitioner, Christa Laznovsky, asks us to review a decision of the Court of Special Appeals that vacated an order of the Circuit Court for Talbot County awarding her custody of the minor children of her and respondent, Frank Laznovsky. She presents two questions:

1. Does a party seeking an award of sole custody place their mental health at issue, so as to require the disclosure of privileged mental health records?

2. Did the Court of Special Appeals err in requiring the disclosure of wife's privileged mental health records?

I. Facts

The parties were married in 1985. They resided in New York for two years, then moved to Talbot County in 1987. Petitioner was, at the time of the marriage, a paralegal; respondent was then, and is now, an attorney. At the time of their marriage, petitioner had a history of psychiatric treatment. Shortly after the start of their marriage, petitioner, at respondent's request, continued in psychiatric treatment. In 1990, the parties had a son. They separated in 1991, reconciled in 1993, and in that year had another son. During the summer and fall of 1994, both parties saw a psychiatrist jointly, Dr. Richard Greenbaum. They separated again in 1995, with respondent moving to Baltimore and living with his secretary and petitioner remaining in the Talbot County home with the children.

At the time of their 1995 separation, they prepared and executed an agreement that, as relevant here, provided for joint guardianship, care and custody of the children, but with petitioner to have primary residential care of the children. Thereafter, petitioner filed a complaint for divorce, and then an amended complaint for divorce in which she sought sole custody of the children. In his answer to petitioner's amended complaint, respondent sought sole custody of the children. Accordingly, by the time of the hearing below, both parties sought sole legal custody of the children.

At the trial level, respondent sought discovery of treatment records relating to petitioner's past mental health treatment. At a deposition, respondent attempted to question

petitioner about her past mental health treatment. She refused to answer the questions, invoking the psychotherapist-patient privilege contained in Maryland Code (1974, 1998 Repl. Vol.), section 9-109(b) of the Courts & Judicial Proceedings Article.[1] Respondent then filed a Motion to Compel Discovery. Petitioner answered with a Motion for Protective Order, and a Motion to Quash the subpoenas directed to her past and present treating mental health psychiatrists, psychologists, and counselors.

The circuit court denied, in part, respondent's Motion to Compel Discovery, initially reserving, however, the issue of whether it would permit subpoenas, which respondent had caused to be issued to certain of petitioner's health care providers, to be utilized to require the production of the records to respondent. The trial court, in its ruling, noted that the scope of the subpoenas was limited to current records in the possession of the providers that "are reasonably related to matters addressing [petitioner's] current parental fitness for custody of the Parties[']' two minor children." As to these records, it directed that the post-1994 records be delivered to the court under seal for the court's inspection *in camera*, with access initially denied to all parties. It also directed that no other documents listed on the subpoenas needed to be produced at that time. Additionally, it found that petitioner had not waived the psychiatrist/psychologist-patient privilege by attempting to obtain sole custody of the children.[2]

Respondent noted an interlocutory appeal in respect to that portion of the trial court's ruling precluding discovery of all of the wife's mental health records. In the meantime, petitioner had complied with the trial court's order by submitting the required records under seal with the trial court. Respondent's interlocutory appeal was dismissed by the Court of Special Appeals as premature.

Approximately a year later,[3] the trial court, as we have indicated, modified its previous order and required the

production of all of the petitioner's mental health records from January of 1995 forward. Petitioner produced those records several days before the hearing.

A separate Motion for Psychological Evaluation was filed by respondent after the trial court's initial ruling that certain of petitioner's records be submitted *in camera*. Petitioner responded to the motion for a psychological examination of the family by requesting it be denied, because, in her opinion, the trial court had already ordered the production of sufficient records, which made a further evaluation unnecessary. She also proffered that, should a review of the records not be sufficient, the trial court had the inherent power to require another evaluation. She stated in her answer:

1. This matter has previously been resolved pursuant to Plaintiff's Motion for a Protective Order . . . in which this Honorable Court ordered that certain records requested by the Defendant and pertaining to Plaintiff's mental health be produced for review, in camera. If, based upon a review of those records, this Honorable Court deemed it necessary and appropriate to require an independent medical/psychological evaluation, same would be forthcoming, pursuant to this Court's inherent ability to so order.

The trial court denied the Motion for Psychological Evaluation. After reviewing the records it had required to be submitted *in camera*, the trial court did not revisit the issue of a psychological evaluation, nor did respondent either then, or after the trial court had reviewed the initial records and ordered *all* of the post-1994 records to be furnished to respondent, renew his request for such an evaluation.

At the conclusion of the merits hearing, the trial court awarded sole legal custody of the children to petitioner, saying: "Sole legal custody is awarded to Mrs. Laznovsky primarily because both of the parties testified that they are unable to communicate." Respondent appealed that decision

(along with several other rulings of the trial court) to the Court of Special Appeals.[4]

As relevant to the issues presented to us, respondent asserted to the Court of Special Appeals that petitioner, by claiming to be a fit and proper person to have sole legal custody of the children, had placed her mental condition at issue and thus had waived the psychiatrist/patient privilege created by Maryland Code (1974, 1998 Repl. Vol.), section 9-109 of the Courts & Judicial Proceedings Article. The Court of Special Appeals agreed and, in a 2-1 decision, reversed the circuit court on that issue. It held, in relevant part, that as to the privilege granted in respect to mental health treatment records by section 9-109(b)[5] and by Maryland Code (1974, 1994 Repl. Vol., 1998 Cum. Supp.), section 4-307 of the Health-General Article, that

These rights must be balanced against the best interests of the children in a contested custody case. Fitness is the dominant consideration in a custody case; the mental and emotional state of a parent is most material and relevant. . . .

. . . .

. . . Wide latitude must be given in discovery to allow a litigant to develop his or her case. The trial court's failure to allow the appellee to adduce the status of the appellee's mental health, her diagnosis, prognosis, and treatment, and its effect on her ability to parent the children and serve as the sole custodial parent, constituted an abuse of discretion. While it is rare to reverse a trial court on a discovery ruling, where a party's case was prejudiced by the failure to produce records that would clearly develop a relevant line of cross-examination and the basis for an expert's opinion as to the fitness of a party to be a custodial parent, it constituted reversible abuse of discretion.[6] [Footnote omitted.]

We disagree and reverse the judgment of the Court of Special Appeals.

II. Privilege

In this review, we must consider whether a statutory privilege is applicable in this custody case. In that process, we must consider the balancing that occurs, or may occur, when a legislatively created privilege appears to conflict with a court-created standard for determinations in custody matters. Our first step is to look at the privilege statutes. What is now Maryland Code (1974, 1998 Repl. Vol.), section 9-109(b) of the Courts & Judicial Proceedings Article,[7] was initially adopted as 1966 Maryland Laws, Chapter 503. Senate Bill 118, the bill which became Chapter 503, as initially filed and presented, did not include any exception permitting a trial court to compel disclosure of mental health records in child custody cases, although it did have other exceptions, including one for when a person places his or her mental condition in issue. The child custody exception was amended into Senate Bill 118 prior to its passage. As initially *enacted*, it contained specific language that permitted a trial judge in a custody proceeding to compel the disclosure of otherwise privileged mental health records, if the judge believed that such disclosure was "necessary to a proper determination of the issue of custody."[8] This prior exception is in accord with the position now taken by respondent and the majority opinion of the Court of Special Appeals below: that if a trial judge, in the exercise of his or her discretion, determines that such records are necessary in order to determine custody matters, then the privilege may be deemed to be overcome by the trial court, on its own motion or on motion of an opposing party.

Since the original enactment of the law, additional exceptions have been added. In 1976, in House Bill 1, the Legislature created another exception:

(II) After the patient's death, his mental condition is introduced by any party claiming or defending through or as a beneficiary of the patient[.]

1976 Md. Laws, Chap. 363. In 1981, another exception was clarified when House Bill 766 was enacted, specifying that the privilege is waived when authorized representatives of the patient make claims against certain mental health care providers. *See* 1981 Md. Laws, Chap. 236.

There has been only one instance where an exception, previously a part of this privilege statute, has been removed or repealed. It relates to the issue squarely before this Court. The exception to the privilege for child custody matters stayed in the law until 1977. At that time, Senate Bill 90 was passed, repealing and reenacting section 9-109 of the privilege statute. Its title stated that it was "For the purpose of eliminating an exception to the privilege to refuse to disclose communications relating to a patient's mental or emotional disorder as related to a psychiatrist or a psychologist." 1977 Md. Laws, Chap. 685. Senate Bill 90 removed the exception permitting trial judges to compel disclosure in child custody matters. This was the only change provided in Senate Bill 90. The child custody exception was not, therefore, inadvertently omitted as part of some general attempt at recodification. It was specifically repealed. The repeal of the exception was an essential element, and the only purpose, of the bill. The legislative history of Senate Bill 90 confirms that its purpose was to ensure the confidentiality of psychiatrist-patient treatment communications and records, *even in child custody cases*. That legislative history permits no other reasonable inferences. The bill file, for instance, includes a Fiscal Note from the Department of Fiscal Services noting that

This bill removes from existing law concerning a patient[']s mental disorder as related to a psychiatrist or psychologist, an exception to the privilege to refuse

disclosure of communications between patient and physician when custody of children is involved.

Additionally, handwritten summaries of the bill's effects are included in the bill file:

[Section] 9-109(b) Cts. & Judicial Proceedings provides for the general privilege to refuse to testify as to communications between a patient and his psychiatrist.

The single exception to this privilege is in [section] 9-109(c) which provides that a judge may compel disclosure in custody cases. SB 90 attempts to delete this exception.

Purpose for this bill is to eliminate circumstances where psychiatrists are called into court, thereby eliminating the therapeutic relationship.

Examples are: patient with severe mental disorder and collateral custody battle may be in position to realize that psychiatric relationship will be disclosed; thereby closing possibility of further treatment.

Dr. Jonas Rappeport, Chief Medical Officer advises that when [General] Assembly enacted psych. privilege in 1966, Model Connecticut law upon which this [section] is based did not have this exception.

Judge Liss stated in letter re 90 that to compel disclosure is "not fair either to the professional person involved nor to his patient, who should be able to speak frankly without fear of disclosure."

The National Organization for Women, in a position letter to the committee, dated January 27, 1977, stated in relevant part:

The National Organization for Women supports Senate Bill 90, concerning Psychiatrist - Patient Privilege.

The marital discord which precedes divorce and custody actions is often of such an emotional nature as to lead one or both parties to seek professional psychiatric counselling in attempting to restructure their lives. It is the dependent spouse, more often the wife, who faces the greater changes during this period, and who views the prospects of economic and emotional independence perhaps for the first time. The desire for psychiatric consultation during this transition is understandable, and it is our feeling that such efforts should not be used against one in custody proceedings, as they may be now.

It is furthermore, deleterious to the therapeutic relationship, which must have as its basis trust and confidentiality, to know that a judge may compel disclosures of a most intimate nature, and that such disclosures may affect the outcome of a custody case.

More important, the Chairman of the Judicial Proceedings Committee, Senator J. Joseph Curran (now Attorney General of Maryland), addressed a letter dated January 20, 1977, to Judge Anselm Sodaro of the Supreme Bench of Baltimore, which invited comment from other judges. In his letter, Senator Curran stated in relevant part:

At the Committee hearing on this bill, questions were posed as to how often in child custody cases does a judge compel disclosure. We understand the need to encourage a full and frank discussion between the patient and the psychiatrist, and want to enact laws to meet this end. However, I would very much like to receive opinions as to how often this information is needed in custody cases.

Judge Solomon Liss, then a member of the Court of Special Appeals, wrote a letter, dated January 25, 1977, to the committee, replying, in relevant part that:

In the eight years I spent on the trial bench, I never found it necessary to compel the testimony of a psychiatrist or psychologist in a child custody case. Of course, those of us on the Supreme Bench . . . had available the services of . . . Dr. Jonas Rappeport and his staff. . . .

. . . I would be reluctant to urge compelled disclosure except as a last resort. Such an edict is not fair either to the professional person involved nor to his patient, who should be able to speak frankly without fear of disclosure.

Judge Watts, replying to the letter from Senator Curran, stated in a letter dated January 26, 1977:

For three years I presided in the Domestic Relations Court of Baltimore City. During the present term I hear domestic cases regularly in addition to my normal case assignment. On the basis of this experience, I can tell you that there have been very few occasions on which I have had to compel an individual to produce psychiatric information. In fact, I can recall only four or five cases where this was necessary. When an individual is under psychiatric treatment, he is usually willing to bring this information to the attention of the Court.

Dr. Jonas R. Rappeport also responded to Senator Curran by letter dated January 24, 1977, stating in relevant part:

As you know, I was involved in the development of the initial psychiatrist/psychologist privilege legislation and worked very strongly for its passage in the 60s. It was with reluctance that our committee of the Maryland Psychiatric Society accepted the child custody exception. However, because of general concerns about the entire concept of this special privilege, we recognized the need to go along with this amendment.

In practice, since the passage of this original

legislation, the child custody exception has caused some hardships. Several colleagues have reported to me the extreme difficulty that they have in working with parents in psychotherapy when the parent is made aware of the fact that anything that they mention in the therapeutic sessions may be brought out in a custody proceedings if the judge feels that such information is germane to his decision. Just a few weeks ago I personally saw a patient for a consultation who currently has custody of his children and felt it necessary to warn him of the fact that anything that he told me might be revealed in court should the judge deem it necessary when and if there was an attempt to gain custody of his children by his former wife. As a result thereof he hesitated about accepting my recommendation for continued treatment with me although I am happy to report that he has accepted my recommendation for treatment and is seeing me. While his feeling was that he would have to take his chances, I have no way of knowing how much this threat of public exposure to the very sensitive psychiatrist/patient relationship will interfere with treatment. In the past I have known of one patient who has elected not to have treatment in view of this particular problem. Several other psychiatrists have reported to me that they feel that this exception to the psychiatrist/patient privilege does prevent very needy parents, that is, people in need of psychiatric treatment, from obtaining it and, therefore, in fact may eventually place the children at a disadvantage. If their parents cannot be "cured", then the child continues to be exposed to an emotionally disturbed parent.

While I recognize that custody decisions are exceedingly difficult ones for the court to make in that the judge needs all the help that he can obtain under such circumstances, I believe that such help can be obtained from other sources. No matter how honestly and openly a psychiatrist subpoenaed into court to testify about his relationship with his patient may wish to be, we can clearly understand that he may not

either present or even know all of the information that might be available to independent examiners. . . . We believe we have served the court very well by having the same psychiatrist and psychologist examine all parties in question to custody battles and thereby have an opportunity for a very well balanced view of the situation. . . . We feel that we are much more capable of rendering an unbiased, overall view of the situation and presenting recommendations that are truly in the best interest of the child than we might be able to do should we be involved with only one parent whether it be a long term therapeutic relationship or merely an evaluation.

For these reasons stated above I feel that the benefits to society of having confidential and privileged treatment available to troubled parents far outweighs the limitations placed upon the court by not having such information revealed against the parents' wishes.

It is clear to us that the Legislature was fully aware of the ramifications of the child custody exception amended into the statute during its original enactment. At the time the exception was repealed, with the information furnished and available to the Legislature through the proceedings of its committee, it is evident that they were being asked to consider the balancing of the interests in the psychiatrist/psychologist-patient privilege with the need of the courts to have such information in assessing the best interests of the children in custody cases.[9] The psychiatrist/psychologist-patient privilege prevailed as the Legislature elected to remove the exception that had theretofore permitted the courts to hold the privilege inapplicable in child custody cases. Thus, the Legislature balanced the interests and made the determination.

Of some interest is the importance of confidentiality in other mental health treatment privilege statutes in which the Legislature has not included any exceptions for child custody cases, although it has created other exceptions. Maryland

Code (1974, 1994 Repl. Vol., 1998 Cum. Supp.), section 4-307(h)(1)(v) of the Health-General Article provides:

(h) . . . (1) A health care provider shall disclose a medical record without the authorization of a person in interest:

. . . .

(v) In accordance with service of compulsory process or a discovery request, as permitted under § 9-109 (d), § 9-109.1 (d), or § 9-121 (d) of the Courts and Judicial Proceedings Article, or as otherwise provided by law, to a court, an administrative tribunal, or a party to a civil court, administrative, or health claims arbitration proceeding . . . .

Subsection 9-109(d) of the Courts & Judicial Proceedings Article, relating to the psychiatrist-patient privilege, is the exception provision under the statute we address in the case at bar. Subsection 9-109.1(d) relates to the patient-psychiatrist mental health nursing specialist privilege; subsection 9-121(d) relates to exceptions in respect to a licensed social worker-client privilege. In none of the other statutes is there a child custody exception. At the time of their enactment, the same concerns expressed at the time of the enactment of 1977 Maryland Laws, Chapter 685 were expressed. Section 9-109.1 was enacted as 1990 Maryland Laws, Chapter 300. The bill file for that enactment indicates that the position of the Maryland Nurses' Association was made available to the Legislature in a letter dated January 17, 1999. The association said, in relevant part:

This is a Patients' Rights bill to ensure that the communication between a client and a psychiatric mental health nursing specialist has the full protection of privileged communication.

The essence of this bill is not new. The precedent has been established in the following sections of the Annotated Code of Maryland (9-109) and (9-121). . . .

Passage of this bill would provide parity for clients of psychiatric-mental health nursing specialists with those of the other core mental health disciplines including psychiatrists, psychologists and social workers.

Currently, citizens in Maryland being treated by psychiatric-mental health nursing specialists have had their records accessed in judicial proceedings without their consent. To say this places these clients at a gross disadvantage is an understatement. All citizens seeking psychiatric-mental health treatment should be assured that their client/provider communications are equally protected under the law.

Even more relevant are some of the communications made available when section 9-121(d) was enacted by Senate Bill 420, just six years after the 1977 repeal of the child custody exception in section 9-109. 1983 Md. Laws, Chap. 531. The bill file contains several pertinent references. First, it contained the testimony of a licensed social worker, Torpley M. Richards, LCSW, which provided, in relevant part:

Several years ago a physician referred to me a man who was distressed by severe marital problems. This man and his wife had previously been in couples therapy but they had not been able to resolve their many differences. They decided to have a trial separation and to seek individual support during this difficult time. When Mr. A was referred to me for treatment, his wife, Mrs. A was referred to a psychiatrist.

One year later, Mrs. A decided to file for divorce. She asked for sole custody of the couples' three children claiming that Mr. A was "unfit" to have custody. Mrs. A's lawyer was well aware that at this time social workers are not protected

by law for privileged communication. Mrs. A's lawyer could have questioned me directly about confidences shared with me by Mr. A, under oath, in a court of law, without Mr. A's permission. At the same time, Mrs. A enjoyed the protection of privileged communication. Fortunately for Mr. A, this case never came to trial.

In communications and testimony before the Senate Judicial Proceedings Committee, the same committee through which 1977 Maryland Laws, Chapter 685 had previously passed, other comments even more directly pointed out the importance of the privilege in child custody cases. A letter dated February 22, 1983, from the Administrator of the Family Counseling Services of Associated Catholic Charities, Inc., provided, in part:

The protection of privileged communication is especially important in cases of separation and divorce, contested child custody . . . suits, and employers seeking information on employees. A typical example of the protection privileged communication provides follows:

A mother, who was concerned about the effects of a recent separation on her children, sought counseling with our agency. Her husband, who was fighting the terms of the divorce settlement, sought information from Associated Catholic Charities which would prove her incompetence as a parent. In fact, this mother was seeking to help her children, who were suffering as a result of the adversarial position of their parents. If we had been required to give information to this husband, the wife would have left counseling, and the children would have continued to suffer.

For these reasons, Associated Catholic Charities supports SB 420.

There was additional testimony on behalf of Associated Catholic Charities, Inc., by Ms. Cheryl Lynch, dated February 24, 1983:

This confidentiality is important in establishing the trust necessary for the client to reveal personal information in order to receive help.

As a family service agency, Catholic Charities serves approximately 300 families a month through its Counseling Services. The protection of privileged communication is especially important in cases of separation and divorce, contested child custody, and employers seeking information on employees. People who are struggling with difficult or emotional problems have to know that they can speak freely to a counselor with the understanding that the information they disclose is held in confidence. From these private disclosures, many people find relief from their suffering and help in resolving their difficulties.

It is clear that the issue of whether there should be an exception from mental health privilege statutes for child custody cases has repeatedly been presented to the Legislature since 1977. In fact, the need for the privilege in child custody cases has been proffered to the Legislature as an important, special reason for the necessity of the privilege. The Legislature, by enacting these subsequent privilege statutes, has not created any exemption for child custody cases.

We emphasize again that we are not faced with a privilege statute that has always been silent as to whether a court could compel the production of otherwise confidential communications in child custody cases. The Maryland statute was originally enacted with a specific exception permitting a court to compel such information in such a circumstance, and that exception remained intact for eleven years. In 1977, addressing the concerns of the mental health profession, the Legislature repealed that provision. The intention of the Legislature is clear. It made a public policy choice not to exempt child custody cases from the scope of the privilege,

and has continued to preserve the privilege even in child custody cases in its enactment of other privilege statutes in the mental health area.

Additionally, Maryland Code (1974, 1994 Repl. Vol., 1998 Cum. Supp.), section 4-302 of the Health-General Article provides that:

(a) *In general.* -- A health care provider shall:

(1) Keep the medical record of a patient or recipient confidential; and

(2) Disclose the medical record only:

(i) As provided by this subtitle; or

(ii) As otherwise provided by law.

Thereafter, there are several exceptions crafted in the Health-General Article. *See* Md. Code (1974, 1994 Repl. Vol., 1998 Cum. Supp.), § § 4-305, 4-306, 4-307. None contain a child custody exception.

As is clear from the legislative history above, the Legislature knows how to craft exceptions to confidentiality privileges. Section 9-109 itself contains several exceptions, as do section 9-109.1 and section 9-110, which deals with the accountant/client privilege.

Maryland Code (1974, 1998 Repl. Vol.), section 5-609 of the Courts & Judicial Proceedings Article affords protection from causes of action for mental health providers when patients subsequently exhibit violent behavior, unless the provider "knew of the patient's propensity for violence" or the patient had indicated to the provider an intention to inflict injury on another. If the provider knows of the propensity, or the patient indicates the intent to injure another, the provider can only avail himself or herself of the immunity protection if

he or she has done certain things, including informing appropriate law enforcement agencies of the patient's propensities or intentions to inflict injury. That statute then provides:

(d) *Patient confidentiality.* -- No cause of action or disciplinary action may arise under any patient confidentiality act against a mental health care provider or administrator for confidences disclosed or not disclosed in good faith to third parties in an effort to discharge a duty arising under this section according to the provisions of subsection (c) of this section.

See also Md. Code (1974, 1998 Repl. Vol.), § 9-112 of the Courts & Judicial Proceedings Article ("Privileged communications -- News media."); *compare* section 9-105 (confidentiality of spousal communications) *with* section 9-106 (providing exceptions in criminal cases involving abuse of minors, and also providing that the privilege is waived if previously the spouse asserted the privilege and refused to testify against the other spouse in a spousal assault case).

Additionally, the Legislature, by a subsequent statute first enacted in 1987, has expressly exempted certain matters relating to reporting allegations of child abuse from the prohibitions against compelled disclosure of psychiatrist-patient diagnosis and treatment records. Maryland Code (1984, 1991 Repl. Vol., 1998 Cum. Supp.), section 5-704 of the Family Law Article (enacted as 1987 Maryland Laws, Chapter 635) provides in relevant part:

§ 5-704. Reporting of abuse or neglect -- By health practitioner . . . .

(a) *In general.* -- (1) *Notwithstanding any other provision of law, including any law on privileged communications,*

each health practitioner, . . . acting in a professional capacity, who has reason to believe that a child has been subjected to:

(i) abuse, shall notify the local department or the appropriate law enforcement agency; or

(ii) neglect, shall notify the local department . . . . [Some emphasis added.][10]

There may well be other privilege statutes containing exceptions.[11] What is clear is that the Legislature knows how to create privileges, and how to create exceptions and how to repeal exceptions. Its decision to repeal the child custody exception at issue in the case *sub judice* was a clear policy statement.

When attempting to discern the intention of the Legislature in enacting a particular statute, we have recently said in *Edgewater Liquors, Inc. v. Liston, 349 Md. 803, 709 A.2d 1301 (1998):*

"In construing the meaning of a word in a statute, the cardinal rule is to ascertain and carry out the real legislative intention." *Tucker v. Fireman's Fund Ins. Co., 308 Md. 69, 73, 517 A.2d 730, 731 (1986); see also Marriott Employees Fed. Credit Union v. Motor Vehicle Admin., 346 Md. 437, 444, 697 A.2d 455, 458 (1997).* Legislative intent generally is derived from the words of the statute at issue. "We are not constrained, however, by . . . 'the literal or usual meaning' of the terms at issue." "Furthermore, we do not read statutory language 'in isolation or out of context [but construe it] in light of the legislature's general purpose and in the context of the statute as a whole.'" "The 'meaning of the plainest language' is controlled by the context in which it appears.").

349 Md. at 807-08, 709 A.2d 1303 (some citations omitted). We commented in an earlier case:

When we pursue the context of statutory language, we are not limited to the words of the statute as they are printed in the Annotated Code. We may and often must consider other "external manifestations" or "persuasive evidence," including a bill's title and function paragraphs, **[***33]** *amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the context within which we read the particular language before us in a given case.*

. . . Thus, in *State v. One 1983 Chevrolet Van, 309 Md. 327, 524 A.2d 51 (1987)*, ... although we did not describe any of the statutes involved in that case as ambiguous or uncertain, we did search for legislative purpose or meaning -- what Judge Orth, writing for the Court, described as "the legislative scheme." . . . . *See also Ogrinz v. James, 309 Md. 381, 524 A.2d 77 (1987)*, in which we considered legislative history (a committee report) to assist in construing legislation that we did not identify as ambiguous or of uncertain meaning.

Kaczorowski v. Mayor and City Council of Baltimore, 309 Md. 505, 514-15, 525 A.2d 628 at 632-33 (1987) (emphasis added).

In the case *sub judice*, the amendment during passage of the original bill that had inserted a child custody exception, the subsequent repeal of the exception, the failure to include child custody exceptions in similar statutes, and the legislative history of the various statutes indicates that the Legislature intended that there be no express exception to the privilege in child custody cases.

There is little case law on the exact issue presented here among our sister states. Several courts that have addressed the issue have dealt with exemption statutes similar to the exemption repealed in this state by 1977 Maryland Laws, Chapter 685. Accordingly, they do not sufficiently address the issue before us to be particularly helpful although we shall discuss cases from two of the states (Alabama and Louisiana) to indicate the view contrary to the one that we adopt here. These states include Alabama, *Harbin v. Harbin, 495 So. 2d 72 (Ala. Civ. App. 1986);* Alaska, *In the Matter of D.D.S., 869 P.2d 160 (Alaska 1994)* (exception for CINA cases); Louisiana, *Carney v. Carney, 525 So. 2d 357* (La. Ct. App.), *writ denied, 530 So. 2d 88 (La. 1988);* Michigan, *LeGendre v. Monroe County, 234 Mich. App. 708, 739 n.18, 600 N.W.2d 78, 94 n.18 (1999)* (sex discrimination case in which the child custody exception was mentioned); Missouri, *In re Marriage of Daneshfar, 953 S.W.2d 95 (Mo. Ct. App. 1997); In the Interest of S.J., 849 S.W.2d 608, 610-11 (Mo. Ct. App. 1993)* (exception in termination of parental rights case); Texas, *Smith v. Gayle, 834 S.W.2d 105* (Tex. App. -- Houston [1st Dist.] 1992). The exception language from the other states' cases are similar to the language of Maryland's repealed exception. For example, the Alabama statute provides: "There is no privilege . . . in a child custody case in which the mental state of a party is clearly an issue and a proper resolution of the custody question requires disclosure." Ala. R. Evid. 503(d)(5). The language of the exception formerly contained in section 9-109 stated: "the presiding judge of a court of record may compel such disclosure in cases involving the custody of children, if, in his opinion, such disclosure is necessary to a proper determination of the issue of custody." 1966 Md. Laws, Chap. 503. Overall, few states have resolved the issue presented in respect to the psychiatrist/psychologist-patient privilege in child custody cases. Moreover, we have found in our research no case in which a foreign state's legislative body has specifically balanced the competing interests of the

needs of proper mental health and the needs for courts to have such information in child custody matters, by first enacting a child custody exception and then repealing it, in order to insure confidentiality of mental health records.

In our review of the law of other states, we look also to the cases in respect to the related physician-patient privilege. We start our review of the foreign authorities by considering privilege cases in respect to petitioner's first question: "Does a party seeking an award of sole custody place their mental health at issue, so as to require the disclosure of privileged mental health records?"

The other states are divided on the issue. Those that answer the question affirmatively generally follow the Alabama approach. Those that answer the question negatively generally follow the Florida approach.

As we have indicated above, there is a child custody exception in Alabama's privilege statute. It is couched in terms of applying where a party's mental state is clearly an issue. In *Thompson v. Thompson, 624 So. 2d 619, 620 (Ala. Civ. App. 1993),* the father had alleged that the mother was "not fit" to be a parent because she was an alcoholic. The intermediate appellate court held that the father's allegation alone was sufficient to place the mother's mental state in issue: "When the issue of the mental state of a party to a custody suit is clearly in controversy, and a proper resolution of the custody issue requires disclosure of privileged medical records, the psychiatrist-patient privilege must yield." *Id.* There are several other Alabama intermediate appellate court decisions that have held similarly. *See Black v. Black, 625 So. 2d 450 (Ala. Civ. App. 1993); Harbin, 495 So. 2d 72.* The Alabama cases are cited often by the courts of other states that have reached a similar holding.

The Indiana Supreme Court perhaps has gone further than any other court in holding that the mere filing of a custody action places a parent's mental health at issue, thus waiving

the privilege for that proceeding and all subsequent custody proceedings. In *Owen v. Owen, 563 N.E.2d 605, 608 (Ind. 1990),* the court, in reversing the judgment of an intermediate appellate court, held:

Christine placed her mental condition in issue when she petitioned for and was granted custody under the original order, and that condition remains in issue for the purposes of custody questions during the children's minority. Therefore, her blanket assertion of the physician-patient privilege regarding her mental condition and treatment was not justified.

When a party-patient places a condition in issue by way of a claim, counterclaim, or affirmative defense, she waives the physician-patient privilege as to all matters causally or historically related to that condition, and information which would otherwise be protected from disclosure by the privilege then becomes subject to discovery.

In *Dawes v. Dawes, 454 So. 2d 311, 312-13* (La. Ct. App.), *writ denied, 457 So. 2d 18 (La. 1984),* the court held that a statutory enactment in respect to custody, passed after the date of passage of the privilege statute, created a specific exception to the privilege because it required the evaluation of the mental and physical health of the parents:

The hospitalization and prescription records which are maintained at DePaul and Oschner Hospitals appear to fall within the protective confines of this statute ["doctor/patient privilege"]. However, we hold that the doctor/patient privileges protected by R.S. 13:3734, et seq., are subject to the additional exception created by the subsequent enactment of the joint custody provisions of C.C. Art. 146 which specifically require the evaluation of the mental and physical health of the parents. The trial court has the power to preserve the confidentiality of this information by the usual

methods of sealing the records, taking testimony in chambers, etc. as may be done in this case.

. . . .

– . . . In reaching its conclusion [a Louisiana Supreme Court decision holding that the privilege was not waived in respect to the issue of separation], the Court reasoned that the legislature had not delineated separation suits as one of the exceptions to the doctor/patient privilege. . . .

However, in this case we find that the plaintiff's physical and/or mental conditions are essential elements to his action for joint custody. That is, there exists a rebuttable presumption that joint custody is in best interest of the child. However, the presumption may be rebutted by a showing that it is not in the best interest of the child. In order to make such a showing, evidence may be introduced regarding the fitness of the parent to care for the child, including among other factors, the moral fitness of the parties involved as well as the mental and physical health of the parties. [Citations omitted.]

Even in some of those states that have held that the mere seeking of custody places a parent's mental health at issue sufficient to operate as a waiver of statutorily enacted privileges, the courts sometimes impose limitations on the disclosure. In *Clark v. Clark, 220 Neb. 771, 775, 371 N.W.2d 749, 752-53 (1985),* the Supreme Court of Nebraska held:

As to the confidential relationship, if any, between Dr. Tatay and Mrs. Clark, she has waived any privilege she had in her conversations with Dr. Tatay by the filing of her petition alleging her fitness to have custody of her child.

As we have stated, we agree with the trial court that by placing her fitness to have custody of her child in issue, Mrs. Clark did waive any physician-patient privilege that existed between herself and Dr. Burlingame and between herself and Dr. Tatay. However, in view of the personal and confidential

communications made between a patient and a psychiatrist (see *Taylor v. United States, 95 U.S.-App. D.C. 373, 222 F.2d 398, 401 (D.C. Cir. 1955)*, "'The psychiatric patient confides more utterly than anyone else in the world . . . '"), when a litigant seeks custody of a child in a dissolution of marriage proceeding, that action does not result in making relevant the information contained in the file cabinets of every psychiatrist who has ever treated the litigant. The determination as to the admissibility of the evidence to which the waiver applies is to be initially entrusted to the sound discretion of the trial court.

There is one case that appears to be in between the holdings of the two primary lines of cases. In *Kinsella v. Kinsella, 150 N.J. 276, 325-30, 696 A.2d 556, 582-85 (N.J. 1997)*, the court appears to have held that such privileged treatment records were discoverable in child custody cases, but then used strong language discouraging such discovery.

However, by contesting custody or visitation, a parent does not automatically put information contained in records of therapy with such professionals "in issue." In regard to therapy records, which are at the heart of the psychologist-patient privilege, the courts must strike a balance between the need to protect children who are in danger of abuse or neglect from unfit custodians and the compelling policy of facilitating the treatment of parents' psychological or emotional problems.[12] Such a balance is in the best interest of the child.

Therefore, the first source of information about the parents' mental health should be the independent experts appointed by the courts or hired by the parties for the purpose of litigation, rather than the professionals who have established relationships with the parties. In most cases, the assistance provided by independent experts should be

sufficient. Only when the court perceives, after consideration of all of the evidence, that the information gained from independent evaluations is inadequate, should the court consider piercing the psychologist-patient privilege to compel disclosure of prior treatment records to the court and the parties. The decision to order such disclosure must be based on independent evidence of potential for harm to the child, for example, the fact of a recent hospitalization, the opinion of an expert, or the court's own observations. . . .

. . . Allegations alone, however, cannot be adequate to justify piercing the psychologist-patient privilege.

Id. at 327-28, 696 A.2d at 583. After directing that the child custody issue be remanded to the trial court for it to conduct a balancing analysis between the competing interests the court went on to suggest to the trial court certain limitations it should utilize in that balancing process.

Courts should be mindful that, although New Jersey's psychologist-patient privilege is modeled on the attorney-client privilege, the public policy behind the psychologist-patient privilege is in some respects even more compelling. . . . The psychologist-patient privilege further serves to protect an individual's privacy interest in communications that will frequently be even more personal, potentially embarrassing, and more often readily misconstrued than those between attorney and client. Made public and taken out of context, the disclosure of notes from therapy sessions could have devastating personal consequences for the patient and his or her family, and the threat of such disclosure could be wielded to unfairly influence settlement negotiations or the course of litigation. Especially in the context of matrimonial litigation, the value of the therapist-patient relationship and of the patient's privacy is intertwined with one of the most important concerns of the courts -- the safety and well-being of children and families. Therefore, only in the most

compelling circumstances should the courts permit the privilege to be pierced.[13]

150 N.J. at 329-30, 696 A.2d at 584.

Cases that hold that the mere filing of a custody action do not place a parent's mental and physical health at issue sufficient to waive the psychiatrist/psychologist/doctor-patient privilege include *Peisach v. Antuna, 539 So. 2d 544, 546 (Fla. Dist. Ct. App. 1989),* in which a father, among other things, sought custody of the minor child due to an allegation that his former wife was psychologically unstable and suffered from migraine headaches, which prevented her from being a fit parent. The wife admitted that she had received psychiatric treatment seven years earlier right after the divorce between the parties. Additionally, the wife was willing to undergo a current mental examination pursuant to the lower court's order. The husband sought to depose the psychiatrist who had treated the wife seven years before as well as three gynecologists who had treated her. The court opined:

At issue, therefore, in custody modification proceedings are the parents' present circumstances. . . . Because the wife has agreed to submit to a psychological examination, the husband and the court will be adequately apprised of her present psychological condition.

Moreover, the trial court's order . . . runs afoul of the psychotherapist-patient privilege, section 90.503, Florida Statutes (1987). The husband claims that the wife waived that privilege by denying allegations of mental instability and stating that the short-term therapy seven years ago had made her an even better parent . . . . The husband's argument is without merit. Mere allegations that the custodial parent is mentally unstable are not sufficient to place the custodial parent's mental health at issue and overcome the privilege.

Likewise, the custodial parent's denial of allegations of mental instability does not operate as a waiver of the patient-psychotherapist privilege. To hold otherwise would eviscerate the privilege; a party seeking privileged information would obtain it simply by alleging mental infirmity. [Citations omitted.] [Footnote omitted.]

Id. at 546; see also Mohammad v. Mohammad, 358 So. 2d 610, 613 (Fla. Dist. Ct. App. 1978) (holding that mere denial of mental instability does not operate to waive the privilege).

The Florida courts have further examined how a person places his or her mental condition in issue in a domestic case, albeit not a custody case, and in the process furnished an example of how mental condition is placed in issue. *Davidge v. Davidge, 451 So. 2d 1051, 1051-52 (Fla. Dist. Ct. App. 1984),* distinguishes between a specific assertion of a mental condition in support of a claim, from the general assertion of fitness typically made or implied in a child custody dispute. *Davidge* involved an attempt to get a property settlement agreement reopened on the grounds of the husband's mental capacity at the time of the execution of the agreement. The husband alleged that "he had been emotionally and mentally incapable of entering into a valid contract" at the time the agreement was made. *Id. at 1051.* At trial, he presented expert and lay opinions "concerning his mental condition before, during and after the time of execution of the agreement." *Id. at 1051-52.* The trial court, however, had refused to allow the wife to present testimony of a psychiatrist who had treated both her and her husband shortly before the execution of the agreement.

The appellate court first noted part of its opinion in *Roper v. Roper, 336 So. 2d 654 (Fla. Dist. Ct. App. 1976), cert. denied, 345 So. 2d 426 (Fla. 1977),* in which the issue of a party's mental condition was raised by an opposing party. "The trial court would be faced with an entirely different

situation if the wife should offer the testimony of her treating psychiatrist to prove her mental condition. In that event the door would have been opened and the privilege waived." *Davidge, 451 So. 2d at 1052* (quoting *Roper, 336 So. 2d at 657).* The Florida privilege statute had an exception similar to one of Maryland's present exceptions. It provided that there was no privilege for communications relevant to the mental condition of a patient in a proceeding "in which he relies upon the condition as an element of his claim or defense." Fla. Stat. ch. 90.503 (1983). The court held that Mr. Davidge was relying specifically on his mental condition at the time the agreement was made in his attempt to get the agreement overturned, and had, accordingly, waived the privilege. *Id.*

In *State ex rel. Husgen v. Stussie, 617 S.W.2d 414, 416-17 (Mo. Ct. App. 1981), superseded by statute as stated in Roth v. Roth, 793 S.W.2d 590 (Mo. Ct. App. 1990),* the parties in a divorce proceeding were contesting the custody of three minor children. The wife sought mandamus relief in the appellate court in respect to discovery of certain of the husband's past and present psychiatric treatment. The Missouri privilege statute, Mo. Rev. Stat. § 491.060 (1978), afforded physician-patient protection. The husband alleged that his conduct had been exemplary. The court framed the issue: "The question thus raised is whether the husband, by seeking custody of the children, has placed his mental health in issue such that he has waived his physician-patient privilege." *617 S.W.2d at 416.*

The wife relied on a statute that specifically stated that in custody matters the mental and physical health of all individuals involved was to be one of the factors in custody disputes. The court, adopting the position of the Florida courts, and essentially expressing the same concerns that Dr. Rappeport expressed in 1977 to the Maryland Senate Judicial Proceedings Committee in regards to Senate Bill 90, held:

Thus, the *Roper* court held that the mere request of custody is not sufficient to waive the physician-patient privilege.

An examination of the facts and law involved in this case reveals that the approach taken by the Florida court is the proper one. By merely seeking custody, the husband has not made his mental health an element of his claim or defense. The psychiatrist-patient relationship involves a high degree of candor not existent in other relationships. This relationship would be seriously compromised if one waives such a privilege whenever, regardless of degree, mental health is a factor. This does not mean that such privilege cannot be waived in a child custody proceeding but there is no waiver here. . . .

Finally, the physician-patient privilege embodies the legislature's balancing of societal interests of confidentiality in furthering full disclosure [to the mental health provider] thereby facilitating treatment[,] and [the] interests served by disclosure of such information in court. If a new balance is to be struck in child custody cases, this is the proper role for the legislature and not for this court.

617 S.W.2d at 416-17 (footnote omitted).

The Connecticut privilege statute involved in *Cabrera v. Cabrera, 23 Conn. App. 330, 580 A.2d 1227 (1990),* had an exception provision that applied "where a party introduces her psychological condition as an element of her claim or defense '*and* the judge finds that it is more important to the interests of justice that the communications be disclosed . . . .' " *Id. at 335, 580 A.2d at 1231* (quoting Conn. Gen. Stat. § 52-146c (1990)). The wife had been counseled by marriage counselors and examined by psychologists for treatment purposes in the past, but had also been currently evaluated by a psychiatrist.[14] The evaluating psychiatrist did not have available to him the records of the previous mental health treatment of the wife. The trial court, however, credited the

report of the evaluating psychiatrist, and awarded custody to the mother. On appeal, the father asserted that all of the prior mental health treatment records should not have been excluded pursuant to the privilege statute. He alleged that because the prior treating mental health providers had shared some of the communications relating to their treatment of his wife with him as a part of that treatment, confidentiality had been destroyed and thus the privilege had been waived. The husband asserted other grounds for waiver, including that the wife had put her own mental health at issue by calling the evaluating psychiatrist to the stand. The court responded to this allegation by stating:

It was the defendant [husband] himself who sought the introduction of the family relations report. It was that report that made an issue of the plaintiff's mental health and that entitled the plaintiff to introduce the testimony of her own expert, Zucker, to rebut it.

. . . .

The defendant's claim that the testimony of Joondeph [the treating mental health provider] should have been admitted because her [the spouse's] mental health was automatically at issue under § § 46b-81 and 46b-82 is also unavailing. While it is true that the plaintiff's health, like that of the defendant, is automatically in issue under § § 46b-81 and 46b-82, those sections do not either specifically or implicitly override the provisions of § 52-146c [the privilege statute]. Rather, as is the general rule in construing statutes that appear to be in conflict, we read them, whenever possible, so as to give effect to both. In this case, this is easily done.

Although information about an individual's mental health may indeed be relevant to the award of alimony and the distribution of property, as it surely is to the award of custody, the sources of information are limited by the provisions of § 52-146c. . . . The provisions of § § 46b-81

and 46b-82 do not, however, render the plaintiff's privilege unavailable in her communications with Joondeph.

Id. at 339, 341, 580 A.2d at 1233, 1234.

In the case *sub judice*, there is no conflicting statute. There has been no relevant statute enacted since the repeal of the statutory exception for child custody cases, which has created any subsequent provision for child custody cases amounting to a statutory waiver of the privilege such as occurred in *Dawes*. To the extent it can be reasonably argued that the Maryland case law in child custody cases supports a parental mental and physical health requirement, it does not conflict with the Maryland statutory privilege, which controls one of the sources of information that would otherwise be available to the trial courts in determining the best interests of children.

This does not mean that the trial courts will never have access to such information. In many, if not most, cases the trial court will have some information. If, in a given case, a party has waived the privilege, that information will be available. If the trial court has before it past mental health treatment information voluntarily furnished by one parent tending to indicate parental fitness, but has no past mental health treatment information in respect to the other parent, because that parent has exercised a psychiatrist-patient privilege, the trial court will have to render its decision on the basis of the evidence it has before it. In some instances, the party exercising the privilege may be at a disadvantage because the portion of the party's own treatment records that is favorable to him or her may not be available to the trial court. Of course, the trial courts also have the option, in their discretion, to order current evaluations of the mental and physical health of the parents and children.[15] The trial court, of necessity, must render its custody decisions on the basis of the evidence before it.

None of the cases we have discussed, neither the Alabama nor the Florida lines of cases, have dealt with an important aspect of this issue that exists in Maryland. As noted, *supra*, prior to 1977 there existed an express exception in the relevant Maryland privilege statute. In 1977, the Legislature addressed that exception, and repealed it. As we perceive the balancing that occurred at that point, the Legislature made a policy decision that the importance of the need for confidentiality for mental health treatment communications, and the records generated in part by the communications, were of sufficient importance to outweigh any exception for child custody matters. We are unwilling to ignore that policy statement by holding to the contrary.

Moreover, as we view the differing points of view of the two lines of cases noted, *supra*, we perceive the Florida line, from the Florida cases mentioned to the Connecticut case of *Cabrera* to be more persuasive.[16] We accordingly hold that, while the mental and physical health of a party is an issue to be considered by the trial court, a person seeking an award of child custody that claims to be a fit parent, does not, without more, waive the confidential psychiatrist/psychologist-patient privilege in respect to her or his past mental health "diagnosis and treatment" communications and records. Fitness of parents is a fundamental and primary element of child custody litigation. It is present even if not stated. It is no more present when it is stated by one party or the other. An assertion that one is fit is merely an assertion that one meets the qualifications to be awarded custody. If it were the law in Maryland that anyone seeking custody of children specifically placed their mental condition in issue, there would be no psychiatrist-patient privilege in custody disputes. The Legislature clearly established a contrary public policy. It chose to preserve the privilege in custody cases. We answer petitioner's first question in the negative. In answering petitioner's first question in the negative, we, of necessity, answer her second question in the affirmative.

There was no cross-petition for certiorari filed by respondent; therefore, our consideration is limited to the questions presented by petitioner.

It is necessary to remand the case to the Court of Special Appeals for a consideration of the issues it declined to address in its opinion. Under the circumstances, it may chose to await the result of the independent mental evaluation it has directed the trial court to order, and the subsequent reconsideration by the trial court of its custody determination after the trial court has available to it that evaluation. Realizing that the question of whether an independent evaluation is necessary is discretionary with a trial court and, given that the trial court had available to it four years of the mental health records of petitioner, the Court of Special Appeals may also want to reconsider that aspect of its judgment. Such a remand, given the positions of the parties, will almost surely result in additional appeals adding to the already tortuous process of this matter in the courts, to the potential detriment of all involved.[17]

Concerning the two issues presented to us, we reverse the judgment of the Court of Special Appeals.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED IN PART; CASE REMANDED TO THAT COURT FOR FURTHER CONSIDERATION OF THE OTHER ISSUES PRESENTED TO IT, BUT NOT ADDRESSED IN ITS OPINION; COSTS TO BE PAID BY RESPONDENT.

Footnotes

n1 Section 9-109(b) provides in relevant part:

§ 9-109. Communications between patient and psychiatrist or psychologist.

. . . .

(b) *Privilege generally.* -- Unless otherwise provided, in all judicial, legislative, or administrative proceedings, a patient or his authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing, communications relating to diagnosis or treatment of the patient's mental or emotional disorder.

. . . .

(d) *Exclusion of privilege.* -- There is no privilege if:

(1) A disclosure is necessary for the purposes of placing the patient in a facility for mental illness;

(2) A judge finds that the patient, after being informed there will be no privilege, makes communications in the course of an examination ordered by the court and the issue at trial involves his mental or emotional disorder;

(3) In a civil or criminal proceeding:

(i) The patient introduces his mental condition as an element of his claim or defense; or

(ii) After the patient's death, his mental condition is introduced by any party claiming or defending through or as a beneficiary of the patient;

(4) The patient, an authorized representative of the patient, or the personal representative of the patient makes a claim against the psychiatrist or licensed psychologist for malpractice;

(5) Related to civil or criminal proceedings under defective delinquency proceedings; or

(6) The patient expressly consents to waive the privilege, or in the case of death or disability, his personal or authorized representative waives the privilege for purpose of making a claim or bringing suit on a policy of insurance on life, health, or physical condition.

n2 Prior to the hearing on the merits, the trial court directed that all of the post-1994 mental health records of petitioner, not only those the trial court had examined *in camera*, be produced to respondent. Accordingly, shortly before the merits hearing, respondent had access to four years of petitioner's mental health records.

n3 The hearing on the merits had been delayed by the illness of respondent's counsel.

n4 Respondent presented the following questions to the Court of Special Appeals:

I. Whether a father in a custody dispute is denied due process under the Fourteenth Amendment to the United States Constitution, where he is precluded from discovering evidence relating to his wife's mental condition and credibility, the non-disclosure of which would undermine confidence in the outcome of the trial.

II. Whether a wife in a custody dispute that has received psychological counseling and treatment for emotional problems during the entire course of the couple's 12 year marriage from eight different psychologists, that alleges that she is a fit and proper person to have the sole care and custody of the couple's two minor children for the purpose of changing the couple's separation agreement which provides for joint custody of the minor children, in order to facilitate her move with the children to New York, has put her mental condition in issue.

III. Whether the best interests of two minor children, ages seven and three, would be best served by the Circuit Court ordering a current psychological examination of the parties to a custody dispute relating to their fitness to serve as the custodial parent of the two minor children.

IV. Whether [the trial court] abused his discretion by awarding sole custody of the couple's two minor children to the mother, when he failed to address or apply the requisite factors or criteria to be considered before making a custody determination.

V. Whether [the trial court] abused his discretion by awarding sole custody of the couple's two minor children to the mother in view of overwhelming evidence that it was in the best interests of the children that their custody be awarded to the father.

[VI.] Whether [the trial court] abused his discretion by awarding indefinite alimony to a self-supporting 37 year old paralegal that earned $ 30,000 annually, where the husband was 50 years old and where the parties have lived separate and apart for five (5) of the thirteen (13) years they had been married.

When the Court of Special Appeals rephrased respondent's issues, it left out questions I, IV, and V altogether. Moreover, it did not address either of those issues in its resolution. Upon remand, the Court of Special Appeals will, of necessity, have to answer questions I, IV, and V, except to the extent those decisions may await the remand to the trial court for independent psychological evaluations consistent with the judgment of the Court of Special Appeals. Petitioner did not present the issue of the Court of Special Appeals' ruling on the necessity of an independent psychological review to us in her Petition for Writ of Certiorari. *See generally Walston v. Sun Cab Co., 267 Md. 559, 298 A.2d 391 (1973).* Additionally, respondent did not file a cross-petition in

respect to the Court of Special Appeals' determination in respect to indefinite alimony.

n5 The Maryland privilege, by its terms, extends only to records and communications dealing with "diagnosis and treatment." *See also Bieluch v. Bieluch, 190 Conn. 813, 817, 462 A.2d 1060, 1063 (1983)* (holding that court-ordered evaluations did not constitute diagnosis and treatment, and, moreover, that the father was not acting as an agent for the children who had been treated; therefore, his telephone communications with the psychiatrist were not encompassed within the Connecticut privilege statute).

n6 In footnote 1 of the majority opinion of the Court of Special Appeals, the author attempted to distinguish one of that court's recent opinions, *In re Matthew R., 113 Md. App. 701, 688 A.2d 955 (1997),* by stating it did not apply because in the present case it was petitioner who was seeking a change in custody. The court was partially incorrect as to the facts. Both parties, petitioner and respondent, were seeking sole legal custody.

n7 From this point forward, any reference to section 9-109(b) is to Maryland Code (1974, 1998 Repl. Vol.), section 9-109(b) of the Courts & Judicial Proceedings Article, unless otherwise indicated.

n8 This was codified to Maryland Code (1957, 1971 Repl. Vol.), Article 35, section 13A, which was superseded by section 9-109(b).

n9 *Nagle v. Hooks, 296 Md. 123, 126-27, 460 A.2d 49, 51 (1983),* was a case concerning who would be qualified, as a representative of a minor child, to waive the psychiatrist/patient privilege in respect to such records

relating to mental health treatment of the child in a child custody case pursuant to section 9-109(b). Commenting on the 1977 repeal of the child custody exception, the Court said: "That provision was eliminated by the legislature in 1977 . . . for some unexplained reason, and is thus not the law today." *Id. at 127, 460 A.2d at 51.* Our current review of the legislative history surrounding the repeal, to a large extent, suggests the Legislature's intention in repealing the exception.

n10 *But see* section 5-707 of the Family Law Article and its confidentiality provisions.

n11 In the case *sub judice*, we are concerned with whether a statutory privilege can be asserted in a child custody case. We are not concerned with the issue of such privileges in a criminal case context. In *Goldsmith v. State, 337 Md. 112, 129, 651 A.2d 866, 874 (1995),* we stated: "We recognize that the defendant's constitutional rights at trial may outweigh the victim's right to assert a privilege." There exist other cases in this state, and in other jurisdictions, concerning the assertion of the privilege in criminal cases that we do not here address.

n12 The medical history in a mental health situation relies on a patient's memory and many other mental processes, including fantasies, imaginational aspects, delusions, and other factors that are not objective in nature. Physical health situations rely, as we perceive it, primarily on more objective factors relating to past physical health characteristics. There would appear to be even more of a need for confidentiality in mental health situations than in physical health situations. For example, a physician can look at a compound fracture and see the bone piercing the skin -- the injury is readily apparent. However, in many instances a psychiatrist or psychologist must delve into the mind and mental history of a patient to find the sources, and treatment, for the mental health problems presented -- the injury or illness is not readily

apparent.

n13 One of the better comments on the importance of confidentiality of psychiatrist- patient communications is found in *Taylor v. United States, 95 U.S. App. D.C. 373, 222 F.2d 398, 401 (D.C. Cir. 1955),* where, albeit in a criminal case, the court stated:

In regard to mental patients, the policy behind such a statute is particularly clear and strong. Many physical aliments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. * * * It would be too much to expect them to do so if they knew that all they say -- and all that the psychiatrist learns from what they say -- may be revealed to the whole world from a witness stand."

n14 Generally, when considering psychiatrist/psychologist-patient privilege issues in child custody matters, the term "treatment" refers to communications and records relating to a patient seeing a mental health professional for the purpose of determining whether the patient has a mental problem, and if so, a diagnosis of what the problem is, and what the proper course of treatment should be. In other words, a patient is seeking to be cured of a mental health problem the patient believes does, or possibly does, exist. The term "evaluation" of mental (or physical) health matters, in the context of child custody cases, refers to a process of examination to determine whether a problem exists and to report to the court the

opinions of the evaluator as to the state of a person's mental health as it might relate to parental fitness. Though both involve mental examinations, the purposes of each is different.

n15 As indicated, *supra,* the Court of Special Appeals' judgment includes a remand to the trial court for it to order an independent psychological evaluation. That part of the judgment of the intermediate appellate court was not presented to us in the Petition for Writ of Certiorari.

n16 There is a contempt case involving the compelled disclosure of treatment records of a juvenile that has held that the doctor-patient privilege did not preclude disclosure, but, nonetheless held that the records were not discoverable because compelled disclosure would violate the patient's constitutional right of privacy. In *In re "B". Appeal of Dr. Loren Roth, 482 Pa. 471, 484, 485, 486, 394 A.2d 419, 425, 426 (1978),* the Supreme Court of Pennsylvania ultimately held that:

We conclude that in Pennsylvania, an individual's interest in preventing the disclosure of information revealed in the context of a psychotherapist-patient relationship has deeper roots than the Pennsylvania doctor-patient privilege statute, and that the patient's right to prevent disclosure of such information is constitutionally based. This constitutional foundation emanates from the penumbras of the various guarantees of the Bill of Rights, *Griswold v. Connecticut, [381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)],* as well as from the guarantees of the Constitution of this Commonwealth . . . .

The nature of the psychotherapeutic process is such that disclosure to the therapist of the patient's most intimate emotions, fears, and fantasies is required. . . . In laying bare one's entire self, however, the patient rightfully expects that

such revelations will remain a matter of confidentiality exclusively between patient and therapist. . . .

We recognize that our holding may, in some cases, make it more difficult for the court to obtain all the information it might desire regarding members of the juvenile's family, or about the juvenile's friends, neighbors, and associates. The individual's right of privacy, however, must prevail in this situation.

We do not directly address the constitutional right of privacy aspects of this case as it is not necessary.

n17 We note again that this case was appealed prematurely by the husband to the Court of Special Appeals and dismissed by that court. Then the husband appealed again to that court after a final judgment had been rendered. It has been reviewed by this Court and reversed and remanded for consideration of unaddressed issues. It is possible that if the Court of Special Appeals remands the case to the trial court for an independent evaluation, the trial court's subsequent decision will again be appealed to the Court of Special Appeals. The decision of the Court of Special Appeals, whatever it may be, could be petitioned to this Court and reviewed again, and, perhaps, given the wealth of information the trial court had at its disposal at the time of the original hearing, reversed again by this Court. In short, we doubt there was reversible error on the part of the trial court in the first instance in choosing not to utilize an independent evaluation given the four years of records it had available, but do not reach the issue at this time because of the limitations of the certiorari questions.